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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. _____

FREDERICK L. WRIGHT, III, and MARJORIE WRIGHT, his wife, and FRED L. WRIGHT, INC., t/a WILLOW HILL HATCHERY, WILLOW HILL POULTRY FARMS and WILLOW HILL POULTRY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

CORRECTED PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Federal Circuit

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Dated: June 28, 1991

195 pg.

QUESTIONS PRESENTED FOR REVIEW

1. The United States Court of Appeals for the Federal Circuit has rendered a decision in conflict with its own decision in Julius Goldman's Egg City v. U.S., 556 F.2d 1096 (U.S. Ct. of App. Fed. Cir., 1977) and 697 F.2d 1051 (U.S. Ct. of App. Fed. Cir., 1983), and committed an error of law in interpreting the definition of fair market value pursuant to the Federal Indemnity Regulations of 21 U.S.C. Section 114, and 21 U.S.C. Section 134, as not including replacement cost and a measure of lost profits.

2. The United States Court of Appeals for the Federal Circuit exceeded its scope of judicial review and committed error in reversing a finding of fact of the trial court, where the record fully supports the

trial court's finding and the U.S. Court of Appeals failed to find that the trial court's finding was "clearly erroneous".

3. As a result of the U.S. Court of Appeals' error in exceeding its scope of judicial review and disturbing the trial court's findings, the U.S. Court of Appeals misapprehended the legal issue and failed to decide whether the Respondent acted pursuant to 21 U.S.C. Section 114a, 21 U.S.C. Section 134a, or both.

4. The U.S. Court of Appeals exceeded the scope of judicial review and abused its authority by substituting its judgment on the credibility of expert witnesses over that of the trial court without finding that the trial court abused its discretion, and where the trial court's findings are fully supported by the record.

5. The U.S. Court of Appeals committed error and abused its discretion by affirming the admission of a hearsay document which formed the basis of a witness's testimony, where the witness had no other independent knowledge of the facts asserted therein.

TABLE OF CONTENTS

		Pages
A.	PARTIES TO PROCEEDINGS	1
B.	REPORTS OF PRIOR OPINIONS	2
C.	JURISDICTION OF COURT	3
C.	STATUTES AND REGULATIONS INVOLVED	4-15
E.	STATEMENT OF CASE	16-28
F.	ARGUMENT	29-48
G.	APPENDIX	

TABLE OF AUTHORITIES

	Pages
Breidor v. Sears, Roebuck & Co. (1983, CA 3 Pa.) 722 F.2d 34	41
Cooper v. U.S., 827 F.2d 762 (Fed. Cir. 1987)	34
Dickson v. International Harvester Company (1985, CA 5 Miss.) 754 F.2d 573	40
Julius Goldman's Egg City v. U.S., 556 F.2d 1096 (U.S. Ct. of App. Fed. Cir., 1977)	passim
Julius Goldman's Egg City v. U.S., 697 F.2d 1051 (U.S. Ct. of App. Fed. Cir., 1983)	passim
Lust v. Clark Equipment Co. (1986, CA 4 Va.) 792 F.2d 436	40, 41
Rodriguez v. Olin Corp. (1986 CA 5 La.) 780 F.2d 491	41
Spesco, Inc. v. General Electric Co. (1983, CA 7 Ind.) 719 F.2d 233	40
Wright v. U.S., 14 U.S. Cl. Ct. 819 (1988)	2, 23

Wright v. U.S., 19 U.S. Cl. Ct. 590 (199) passim

Wright v. U.S., U.S. Ct. of App. for the Fed. Cir., 90-5089, -5096 (1991) passim

Wright v. U.S. Department of Agriculture, No. 86, 3171, 1987 W.L. 13756, Eastern District of PA, July 14, 1987 23

9 C.F.R. 53.3 passim

9 C.F.R. Part 81.14 15, 24

21 U.S.C. Section 114 passim

21 U.S.C. Section 134 passim

28 U.S.C.A. Section 1254(1) 3

28 U.S.C.A. Section 1491 27

A. PARTIES TO PROCEEDING

All parties to this proceeding are listed in the caption.

B. REPORTS OF PRIOR OPINIONS

1. Memorandum and Order dated July 14, 1987, Huyett, J., U.S. Dist. Ct. for the Eastern Dist. of PA.

2. Wright v. U.S., 14 U.S. Cl. Ct. 819 (1988).

3. Wright v. U.S., 19 U.S. Cl. Ct. 590 (1990).

4. Wright v. U.S., U.S. Ct. of App. for the Fed. Cir., 90-5089, -5096 (19991).

C. JURISDICTION OF COURT

1. The date of the entry of the judgment or decree sought to be reviewed is February 12, 1991.

2. The date of the order denying the Petition for Re-hearing is dated March 15, 1991.

3. The Honorable Supreme Court has jurisdiction to review the judgments or decrees of the U.S. Ct. of Appeals of the Fed. Cir. in question by Writ of Certiorari pursuant to 28 U.S.C.A. Section 1254(1).

D. STATUTES AND REGULATIONS INVOLVED

1. 21 U.S.C. Section 114a. Control and eradication of diseases; cooperation of States and farmers' associations; purchase and destruction of diseased animals; definition of State.

The Secretary of Agriculture, either independently or in cooperation with States or political subdivisions thereof, farmers' associations and similar organizations, and individuals, is authorized to control and eradicate any communicable diseases of livestock or poultry, including, but not limited to, tuberculosis and paratuberculosis of animals, avian tuberculosis, brucellosis of domestic animals, southern cattle ticks, hog cholera and related swine diseases, scabies in sheep and cattle, dourine in horses, scrapie and blue tongue in sheep, incipient

or potentially serious minor outbreaks of diseases of animals, and contagious or infectious diseases of animals (such as foot-and-mouth disease, rinderpest, and contagious pleuropneumonia) which in the opinion of the Secretary constitute an emergency and threaten the livestock industry of the country, including the payment of claims growing out of destruction of animals (including poultry), and of materials, affected by or exposed to any such disease, in accordance with such regulations as the Secretary may prescribe. As used in this section, the term "State" includes the District of Columbia, Puerto Rico, and the Territories and possessions of the United States.

May 29, 1884, c. 60, Section 11, as added Sept. 21, 1944, c. 412, Title I, Section 101(a), 58 Stat. 734, and amended Oct. 30, 1951, c. 637, Section I, 65 Stat.

693; Aug. 8, 1953, C. 381, 67 Stat. 493; Aug. 3, 1956, c. 950, Section 2, 70 Stat. 1032; July 2, 1962, Pub.L. 87-518, Section 7, 76 Stat. 131.

2. 21 U.S.C. Section 134a: Seizure, quarantine, and disposal of livestock or poultry to guard against the introduction or dissemination of communicable disease--Authority of Secretary

(a) The Secretary, whenever he deems it necessary in order to guard against the introduction or dissemination of a communicable disease of livestock or poultry, may seize, quarantine, and dispose of, in a reasonable manner taking into consideration the nature of the disease and the necessity of such action to protect the livestock or poultry of the United States: (1) any animals which he finds are moving

or are being handled or have moved or have been handled in interstate or foreign commerce contrary to any law or regulation administered by him for the prevention of the introduction or dissemination of any communicable disease of livestock or poultry; (2) any animals which he finds are moving into the United States, or interstate, and are affected with or have been exposed to any communicable disease dangerous to livestock or poultry; and (3) any animals which he finds have moved into the United States, or interstate, and at the time of such movement were so affected or exposed.

Determination of extraordinary emergency due to dangerous communicable disease; seizure, quarantine, and disposal of animals; action authorized only if

adequate measures not taken by State or other jurisdiction; notice to State or other jurisdiction.

(b) Whereas the existence of any dangerous, communicable disease of livestock or poultry, such as foot-and-mouth disease, rinderpest, or European fowl pest, on any premises in the United States would constitute a threat to livestock and poultry of the Nation and would seriously burden interstate and foreign commerce, whenever the Secretary determines that an extraordinary emergency exists because of the outbreak of such a disease anywhere in the United States, and that such outbreak threatens the livestock or poultry of the United States, he may seize, quarantine, and dispose of, in such manner as he deems necessary or appropriate, any animals in the United States which he finds are or have been affected with or exposed to any

such disease and the carcasses of any such animals and any products and articles which he finds were so related to such animals as to be likely to be a means of disseminating any such disease: Provided, That action shall be taken under this subsection only if the Secretary finds that adequate measures are not being taken by the State or other jurisdiction. The Secretary shall notify the appropriate official of the State or other jurisdiction before any action is taken in any such State or other jurisdiction pursuant to this subsection.

Notice to owner to quarantine or to dispose of animal, carcass, product, or article; action on failure to comply; costs.

(c) The Secretary in writing may order the owner of any animal, carcass, product, or article referred to in subsection (a) or (b) of this section, or

the agent of such owner, to maintain in quarantine and to dispose of such animal, carcass, product, or article in such manner as the Secretary may direct pursuant to authority vested in him by such subsections. If such owner or agent fails to do so after receipt of such notice, the Secretary may take action as authorized by said subsections (a) and (b) and recover from such owner or agent the reasonable costs of any care, handling, and disposal incurred by the Secretary in connection therewith. Such costs shall not constitute a lien against the animals, carcasses, products, or articles involved. Costs collected under this section shall be credited to the current appropriation for carrying out animal disease control activities of the Department.

Compensation of owner; fair market value; payments from State or other source; availability of funds.

(d) Except as provided in subsection (e) of this section, the Secretary shall compensate the owner of any animal, carcass, product, or article destroyed pursuant to the provisions of this section. Such compensation shall be based upon the fair market value as determined by the Secretary, of any such animal, carcass, product, or article at the time of the destruction thereof. Compensation paid any owner under this subsection shall not exceed the difference between any compensation received by such owner from a State or other source and such fair market value of the animal, carcass, product, or article. Funds in the Treasury available for carrying out animal disease control

activities of the Department of Agriculture shall be used for carrying out this subsection.

Restriction on payment of compensation in cases of violation of law or regulation.

(e) No such payment shall be made by the Secretary for any animal, carcass, product, or article which has been moved or handled by the owner thereof or his agent knowingly in violation of a law or regulation administered by the Secretary for the prevention of the interstate dissemination of the communicable disease, for which the animal, carcass, product, or article was destroyed or a law or regulation for the enforcement of which the Secretary enters or has entered into a cooperative agreement for the control and eradication of such disease, or for any animal which has moved into the United States contrary to such law or regulation

administered by the Secretary for the prevention of the introduction of a communicable disease of livestock or poultry.

Pub.L. 87-518, Section 2, July 2, 1962, 76 Stat. 129.

3. 9 C.F.R. 53.3: Appraisal of animals or materials.

(a) Animals affected be or exposed to disease, and materials required to be destroyed because of being contaminated by or exposed to disease shall be appraised by a Veterinary Services employee and a representative of the State jointly, or, if the State authorities approve, by a Veterinary Services employee alone.

(b) The appraisal of animals shall be based on the fair market value and shall be determined by the meat, egg production,

dairy or breeding value of such animals. Animals may be appraised in groups providing they are the same species and type and providing that where appraisal is by the head each animal in the group is the same value per head or where appraisal is by the pound each animal in the group is the same value per pound.

(c) Appraisals of animals shall be reported on forms furnished by Veterinary Services. Reports of appraisals shall show the number of animals of each species and the value per head or the weight and value by pound.

(d) Appraisals of materials shall be reported on forms furnished by Veterinary Services. Reports of appraisals of materials shall, when practicable, show the number, size or quantity, unit price, and total value of each kind of material appraised.

(21 U.S.C. 112, 113, 115, 117, 120, 121, 134b) [28 FR 5935, June 13, 1963, as amended at 35 FR 13981, Sept. 3, 1970; 36 FR 25217, Dec. 30, 1971]

4. 9 C.F.R. Part 81.14 - Appraisal

Poultry, carcasses or parts thereof, eggs, products, or articles required to be destroyed in accordance with Section 81.12 shall be appraised by a Veterinary Services employee. The appraisal shall be the fair market value at the time of Destruction as determined by such employee.

E. STATEMENT OF CASE

In 1983, Petitioner was a breeder of poultry and had incorporated his flock with that of one Henry K. Miller, an internationally known and recognized breeder of quality poultry. The Petitioner, Wright, building on Miller's bloodline, started his own strain of internationally recognized poultry.

Evidence at trial established that Petitioner had an excellent reputation as a breeder and had shipped birds around the world. Petitioner's business had increased over the years, and the business was incorporated as Fred. L. Wright, Inc., with three divisions. Willow Hill Hatchery was the chick hatching division, the day old bird business was the selling operation for day old chicks, and Willow Hill Poultry Farms was the breeding operation which produced hatching eggs.

In April of 1983, a contagious viral disease know as avian influenza infected poultry in Pennsylvania which resulted in quarantine zones being established by the Pennsylvania Department of Agriculture. The avian flu outbreak could not be contained, and on November 4, 1983, the United States Department of Agriculture became involved and established quarantine zones prohibiting interstate movement of poultry. The USDA and PDA acted in harmony with one another in that the PDA established intrastate quarantine zones prohibiting movement of poultry within the Commonwealth of Pennsylvania.

On November 9, 1983, the United States Department of Agriculture declared an "extraordinary emergency" and authorized the Secretary of Agriculture to "seize, quarantine and dispose of (infected) poultry and other items . . ."

In June of 1984, Petitioner's flock had been tested, and the test results indicated that part of Petitioner's flock had tested sero positive for avian influenza antibodies. Testing sero positive for AI antibodies does not mean that the flock was infected with AI. In fact, at the time of the destruction of Petitioner's rare and exotic birds, Respondent was testing sero positive birds at the National Veterinary Services Laboratories in Ames, Iowa. Despite injecting the birds with steroids in a controlled environment in order to break down the immunity, the birds' immunity could not be shaken, and the sero positive birds never developed AI. These results were released shortly after the destruction of Petitioner's flock.

Pursuant to the applicable regulations, Petitioner's flock was to be destroyed, and Petitioner was to be reimbursed for the fair market value of the flock. Fair market value is "determined by the meat, egg production, dairy or breeding value . . ." of the animals destroyed. 9 C.F.R. Section 53.3(b)(1984). The United States Department of Agriculture, in spite of the regulation cited instructed its expert to value the flock as "exhibition birds". The exact statement signed by the appraiser is as follows:

> "We, the undersigned, being licensed judges of the American Poultry Association, have appraised these exhibition birds for their fair market value as show birds. We have not determined their value as breeders." (U.S. Court of Appeals for the Federal Circuit, Joint Appendix 35-36) (Emphasis added)

Petitioner also retained an expert, and both experts were instructed by USDA to value the flock as "exhibition birds", even though they both knew they were valuing breeding birds.

On July 23, 1984, the United States Department of Agriculture ordered Petitioner to destroy his flock by July 26, 1984. During this time period, the Petitioner was negotiating with the United States Department of Agriculture to develop a plan to save the rare and exotic bloodlines, and, in fact, professors from Penn State University and the University of Wisconsin developed plans to save Petitioner's flock from eradication. It must be noted that the birds in question were not mere meat or egglaying birds, which could easily be valued, but rather were rare and exotic breeds with a special bloodline representing over 60 years of

very strict and specialized breeding. Respondent agreed to consider and review these plans.

On July 31, 1984, Congressman Gus Yatron, representing Petitioner's congressional district, met in Washington with Asst. Secretary of Agriculture, Thomas Kay, and acting Asst. Secretary, Karen Darling. The USDA officials agreed to review the plans and notify Congressman Yatron of their decision. Shortly after the meeting, late in the evening of July 31, 1984, Congressman Yatron was notified that the birds would be destroyed.

The next morning, at approximately 5:00 a.m., Petitioner's farm was literally invaded by two Federal marshalls, four state police officers and 75 Federal employees, who destroyed Petitioner's flock, sheep, pigs and pet dogs, all in the presence of Petitioner and his family.

There were 5,506 birds which were killed by the Respondent. Congressman Yatron, in a public statement, stated that the USDA's action was "very insensitive" and "bureaucratic arrogance at its worse". (Joint Appendix 37, U.S. Court of Appeals for the Federal Circuit)

After the destruction of Petitioner's flock, the Respondent offered $33,025.44. Petitioner rejected this offer as inadequate and submitted two claims to the USDA for the fair market value of the flock in the amount of $1,900,000.00, and one for property damage occasioned by Respondent in its cleaning and disinfecting in the amount of $39,000.00; Petitioner's claim for the flock was rejected by USDA, Petitioner's claim for the property damage was never considered or acted upon by USDA. After Petitioner's administrative remedies were exhausted, Petitioner filed suit in the

United States District Court for the Eastern District of Pennsylvania. The District Court transferred the case for lack of jurisdiction to the United States Claims Court. (See Wright v. US Department of Agriculture, No. 86, 3171, 1987 W.L. 13756, Eastern District PA, July 14, 1987.)

The Claims Court, in Wright v. U.S., 14 Claims Court 819 (1988), dismissed Petitioner's constitutional claims of due process, equal protection and taking claims for lack of jurisdiction, but held that the appraisal regulations at 9 C.F.R. Section 53.3(b) and 9 C.F.R. Section 81.14 (1984) were to be considered in reviewing the Secretary of Agriculture's determination of fair market value. The Claims Court held that the statutes in question mandated that the flock be evaluation on the basis of

"meat, egg production . . . or breeding value". 9 C.F.R. Section 53.3, 81.14 (1984).

In light of the Claims Court's opinion, the Respondent instructed its expert to re-appraise Petitioner's flock as breeders. The Claims Court found that the re-appraisal was not done as breeders, and, yet again, on 3/10/89, the Claims Court ordered another remand for a third evaluation by the Secretary of Agriculture. The USDA merely stuck with its original appraisal on the third remand, but added $1,340.00 from an appraisal conducted in 1988.

The trial of this case took place on two issues: 1. Was the Secretary of Agriculture's determination of fair market value arbitrary, capricious, an abuse of discretion and/or contrary to law; and 2.

Was the Respondent liable to Petitioner for damage committed during the cleaning and disinfecting of Petitioner's premises?

The Claims Court found that the Respondent had acted arbitrarily, capriciously, abused its discretion, and acted contrary to law after reviewing the statutes and regulations in question, as well as the Egg City cases and the facts of this case. The only legal authority to review the fair market value determination in consideration of the indemnity regulations in question was the Egg City cases, and based upon applicable statutes, regulations and the Egg City cases, as well as the prior precedents set by Respondent, the Claims Court ordered judgment in favor of the Petitioner and against the Respondent as follows:

1. $45,676.50, base replacement cost for Petitioner's flock;

2. $64,453.50, compensation for transportation costs;

3. $409,656.82, lost profit for two selling seasons;

4. $3,071.77, property damage to Petitioner's premises;

5. Total verdict, $522,858.59.

The case was appealed to the Court of Appeals for the Federal Circuit, who reversed the trial court's judgment in part, and reduced the verdict from $522,858.59 to $37,437.21. The key issue in this case is the definition of fair market value as applied to this case in consideration of the law and prior precedent of the Department of Agriculture. Replacement cost, including lost profit as a measure of fair market value was awarded to the California poultry farmers in the Egg City cases, and to deny the same damages to the Pennsylvania farmers, as the

U.S. Court of Appeals for the Federal Circuit has done, is to apply the law in an unjust, inequitable and discriminatory fashion, and is in violation of the statutes, regulations and precedent established prior hereto. The decision of the Court of Appeals for the Federal Circuit is in direct conflict with the opinion in the Egg City cases, and merely substitutes its judgment for that of the Claims Court in violation of its scope of review, thereby resulting in an abuse of discretion.

Federal jurisdiction is found, in the first instance, in 28 U.S.C.A. Section 1491.

The Petitioner then filed a Petition for Re-hearing and Suggestion for Re-hearing, En Banc, with the United States Court of Appeals for the Federal Circuit, both of which were denied by said court.

Thereafter, the Petitioner filed a timely Petition for a Writ of Certiorari in the Supreme Court of the United States.

The issues are now ripe for review by your Honorable Supreme Court of the United States.

F. ARGUMENT

1. The United States Court of Appeals for the Federal Circuit has rendered a decision in conflict with its own decision in Julius Goldman's Egg City v. U.S., 556 F.2d 1096 (U.S. Ct. of App. Fed. Cir., 1977) and 697 F.2d 1051 (U.S. Ct. of App. Fed. Cir., 1983), and committed an error of law in interpreting the definition of fair market value pursuant to the Federal Indemnity Regulations of 21 U.S.C. Section 114, and 21 U.S.C. Section 134, as not including replacement cost and a measure of lost profits.

The definition of fair market value used by the Court of Appeals is the definition customarily used in Fifth Amendment taking cases. However, the case sub judice involves the indemnity statutes and regulations and is not a Fifth Amendment taking case. The only other case

to address fair market value in the factual and legal context of this case are the Egg City cases, which clearly held as follows, in Egg City I, 566 F.2d 1098:

> "The number of chickens was multiplied by monetary indemnities based on the government's view of the then-current fair market value costs of obtaining replacement birds of various ages." Emphasis added.

In addition, in Egg City II, 697 F.2d 1051, at page 1055, 1056, the court held as follows:

> "Thus, each rancher was paid a supplemental indemnity that was based on a formula which included the rancher's theoretical lost profits from his flock in the 26 weeks following destruction. The Secretary had calculated that 26 weeks was necessary to raise a chicken to profitable egg laying age." (Emphasis added.)
>
> "Rather, the supplemental indemnity was an adjustment of one element in the initial determination of fair market value, that is, lost profits from egg production during the 26 weeks following destruction. The supplemental indemnity was intended only to add to the first indemnity in order to pay full

> compensation for the destroyed chickens. The earlier determination of fair market value resulting in the initial indemnity included some recognition of lost profits as an element of fair market value, i.e. the values represented by the opportunity to make profits from a chicken." (Emphasis added.)

It is clear in reviewing Egg City, the only fair market value indemnity case and squarely on point with this case, that the Court of Appeals for the Federal Circuit permitted replacement cost and an element of lost profits to form a part of fair market value.

The Ct. of Appeals attempts to distinguish Egg City by indicating in Egg City "there was no actual market for chickens of various ages in an egg ranchers flock". (See slip opinion, page 3.) This is clearly a distinction without a difference. The USDA in Egg City concluded that during the period of time it took the

chicks to reach egg laying age, the farmers were without income and were entitled to lost profits. That was because there was no market for the chicks until they reached egg laying age.

That logic is no different from the instant case. Replacement birds or chicks must reach sexual maturity before they can begin breeding, and the testimony at trial established that in most cases it takes at least two years for such a bird to become a proven breeder. During this period of time, the breeder owner is without income. Further, there was no evidence on which the panel could make any type of assumption that a market existed for these birds otherwise. Thus, the distinction raised by the panel is not a distinction at all and results in unequal application of the law and regulations as they apply in this case and Egg City.

The decision of the trial court awarding replacement cost and lost profit as an element of fair market value is fully supported by the record and the Egg City decision, and no abuse of discretion or clearly erroneous finding of fact has been made. The panel abused its review authority in reversing the decision of the trial court.

2. The United States Court of Appeals for the Federal Circuit exceeded its scope of judicial review and committed error in reversing a finding of fact of the trial court, where the record fully supports the trial court's finding and the U.S. Court of Appeals failed to find that the trial court's finding was "clearly erronious".

The standard of review by the United States Court of Appeals for the Federal Circuit is a review of Claims Court

decision for "errors of law" and "clearly erroneous findings of fact". Cooper v. U.S., 827 F.2d 762 (Fed. Cir. 1987).

In the case sub judice, the Ct. of Appeals reversed a finding of fact of the trial court and held that

> "the record shows that USDA did value the flock specifically as breeders and did adjust its original appraisal, based on the value as exhibition birds accordingly." (See footnote, slip opinion, page 4.)

The above-quoted finding by the Court of Appeals is in direct conflict with the trial court's finding on this point. On this issue, the trial court found at 19 U.S. Cl. Ct., 598599:

> "Because the USDA did not evaluate Plaintiff's flock on the basis of their egg, meat or breeder value, it was therefore necessary for the court to determine the factual question as to what constituted 'fair market value' for a poultry breeder in Plaintiff's circumstances under the applicable law.
>
> Mr. Bortner's testimony and demeandor at trial left this court in great doubt as to

whether he actually re-evaluated Plaintiff's entire flock or merely appeased the Secretary by raising the value of a few birds.

His reappraisal letter to the Secretary cast sonciderable doubt on his re-evaluation. It stated:

> 'Having reviewed the enclosed file on my initial appraisal of the Avian Flock of Mr. Fred Wright, on July 7, 1984, I find very little that I can honestly re-appraise.
>
> As stated on all the forms carrying my signature, the "Value was based on Market Value of EXHIBITION Poultry. . . . .
>
> I can not [sic] in all sincerity, evaluate any of these birds ... as breeders.... I personally do not think anyone can do that.'

Letter from B.R. Bortner to USDA (December 27, 1988) (Emphasis in original). Mr. Bortner's teestimony at trial was conflicting on this point, although in the end he asserted that he did indeed evaluate all of the birds as breeders. The inconsistency in his estimony on two different days and his final assertion that he did evaluate the whole flock as breeders combined with his inability to explain the plain meaning of his letter written at the time of his

> re-appraisal, persuaded the court to discount his testimony on this issue. The court was simply not convinced that Mr. Bortner ever evaluated plaintiff's entire flock on proper statutory grounds."

The Court of Appeals failed to find that the trial court's finding of fact, that the USDA did not value the flock as breeders, was "clearly erroneous". Further, a review of the record unequivocably supports the trial court's finding that the USDA did not value the birds as breeders in conformance with the statute.

The record, at Joint Appendix 515-516 speaks for itself:

> "The witness. I kept these birds in my mind from the day that we evaluated them. They impressed me more than anything else there. And, when the government asked me to do this re-evaluation, they were the first ones that came to my mind. And, I re-evaluated them then.
>
> The court. As breeders or as exhibition birds?
>
> The witness. Here we go again, as exhibition birds.

The court. OK. So you never evaluated any of Mr. Wright's birds as breeder birds?
The witness. No."

The Court of Appeals simply substituted its view of a finding of fact over that of the trial court despite the record supporting the trial court's finding and without finding that the trial court's finding of fact was "clearly erroneous".

The Court of Appeals has committed a grave abuse of discretion in exceeding its scope of review.

3. As a result of the U.S. Court of Appeals' error in exceeding its scope of judicial review and disturbing the trial court's findings, the U.S. Court of Appeals misapprehended the legal issue and failed to decide whether the Respondent acted pursuant to 21 U.S.C. Section 114a, 21 U.S.C. Section 134a, or both.

Had the Court of Appeals correctly stayed within its scope of review, the Court of Appeals would have affirmed the finding of the trial court that the USDA never appraised the Plaintiffs' flock as breeder birds. This finding is crucial because it goes to the trial court's finding that the USDA acted arbitrarily, capriciously, abused it discretion and violated statutory standard. Assuming for purposes of argument that the USDA did not value Plaintiffs' flock as breeders, as found by the trial court and supported by the record, the issue then becomes, was the method used by the USDA arbitrary, capricious and violative of statutory standard. The section in question, 21 USC Section 114a and its regulations, 9 CFR 53.3(b), clearly state as follows:

> "The appraisal of animals shall be based on the fair market value and shall be determined by

> the meat, egg production, dairy or breeding value of such animals." (Emphasis added.)

In this case, the USDA did not appraise Plaintiffs' flock by any of the regulatory guidelines as set forth above. Instead, and as found by the trial court and fully supported by the record, USDA appraised the Plaintiffs' breeder flock as "exhibition birds". Exhibition birds appear nowhere in the law, and is not a standard for valuation.

As a result of the Court of Appeals' error in reversing the finding of fact that the Plaintiffs' flock was not appraised as breeders, the Court of Appeals failed to reach the pivotal question of the proper guideline to be used in valuation and the issue of the arbitrary, capricious and beyond statutory standard actions of the Respondent as found by the trial court.

4. The U.S. Court of Appeals exceeded the scope of judicial review and abused its authority by substituting its judgment on the credibility of expert witnesses over that of the trial court without finding that the trial court abused its discretion, and where the trial court's findings are fully supported by the record.

The issue of the credibility of an expert witness is a matter left solely to the sound discretion of the trier of fact for it is he who observed the witnesses and noted their demeanor at trial. Conflicting expert testimony is also left to the trier of fact, and the trial court's decision will not be reversed unless found to be manifestly erroneous or an abuse of discretion. (See Dickson v. International Harvester Company [1985, CA 5 Miss.], 754 F.2d 573, Spesco, Inc. v. General Electric Co. [1983, CA 7 Ind.] 719 F.2d 233, Lust v.

Clark Equipment Co. [1986, CA 4 Va.] 792 F.2d 436, Breidor v. Sears, Roebuck & Co. [1983, CA 3 Pa.] 722 F.2d 34, Rodriguez v. Olin Corp. [1986 CA 5 La.] 780 F.2d 491.

In the instant case, the Ct. of Appeals merely substituted its judgment on the credibility and believability of expert witnesses over that of the trial court. For example, the panel's opinion, at slip opinion, page 4, found:

> "And Shollenberg, who served as one of Plaintiffs' experts and who accompanied Bortner at the original evaluation and testified at trial that 'at the time of evaluation he could see no greater value of the flock as breeders than as exhibit birds' . . . at footnote 4, "that the adjustment was minor was no reason to question the truth of USDA's stated basis for its final appraisal, especially in light of Shollenberg's testimony."

The above view of the Ct. of Appeals merely substitutes its judgment of which experts to believe without discussing that

the trial court's finding on the believability of Plaintiffs' experts is supported by the record and was not an abuse of discretion or manifestly erroneous.

The trial court found at 19 Claims Court 598, 599 as follows:

> "Mr. Bortner's testimony and demeanor at trial left this court in great doubt as to whether he actually re-evaluated Plaintiffs' entire flock or merely appeased the Secretary by raising the value of a few birds. . . . The inconsistency in his testimony on two different days and his final assertion that he did evaluate the whole flock as breeders, combined with his inability to explain the plan meaning of his letter written at the same time of his re-appraisal, persuaded the court to discount his testimony on this issue. The court was simply not convinced that Mr. Bortner ever evaluated Plaintiffs' entire flock on proper statutory grounds. (Emphasis added.)
>
> . . . At trial it became clear that Mr. Shollenberg had not valued Plaintiffs' flock on July 7, 1984, as breeders, nor had he ever evaluated Plaintiffs' flock for their breeder value. In addition, Mr. Shollenberg

testified that at the time of evaluation, he could see no greater value in the flock as breeders than as exhibition birds. This testimony is inconsistent with the testimonies of other experts which the court found more credible. The testimonies of the other experts who agreed on these latter points were very convincing to the court. Because Mr. Shollenberg's testimony was inconsistent with other credible expert testimony, the court discounted its contradictory testimony." (Emphasis added.)

By comparison, the trial judge held in regard to Plaintiffs' two main expert witnesses at 19 Claims Court 601 as follows:

> "Plaintiff provided the expert opinion of two witnesses . . . Mr. Hans Schippers, a breeder from Holland, provided testimony which was, in general, most instructive and helpful to the court . . .
>
> The testimony of Dr. Charles Waybeck, Plaintiffs' other expert witness, was also highly credible and instructive." (Emphasis added.)

The panel merely substituted its judgment on the credibility of the expert witnesses over that of the trial court without proper basis for doing so. The record supports the trial court's finding of credibility on behalf of the Plaintiff's expert witnesses. As a result of exceeding its scope of review, the panel has misapprehended the facts of the case and misapplied the law.

5. The U.S. Court of Appeals committed error and abused its discretion by affirming the admission of a hearsay document which formed the basis of a witness's testimony, where the witness had no other independent knowledge of the facts asserted therein.

Petitioner claimed that as a result of the cleaning and disinfecting by the Respondent, Petitioner had to replace two

incubators. The incubators were controlled by mercury contact thermostats, which were lost and destroyed during the cleaning and disinfecting operation. The Plaintiff testified that the thermostats in question were no longer available, but that he did find like kind incubators for sale, used, at a cost of $35,000.00.

The government introduced Exhibit No. 60, Jt. App. Ct. of App. for the Fed. Circ., 729, which allegedly showed that the thermostats in question were available at a cost of $562.50. The Petitioner objected to this document and the testimony, which were overruled by the court, for the reason that the trial court and the Ct. of Appeals both felt that the Respondent's testimony on this point was supported by independent evidence on the record. At no time did the trial court or the appellate court point

out this alleged "independent evidence", and the Petitioner contends that no such evidence exists.

The Ct. of Appeals found at slip opinion, page 5:

> "Wright similarly failed to meet his burden of showing that replacement thermostats for the two incubators were unavailable. Longwith's testimony independently supports the government's claim that replacement thermostats existed."

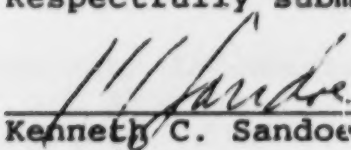
Not only was the document in question in violation of Federal Rule 804(b)(5), but a review of the record proves that Longwith's testimony does not independently support the Respondent's claim that replacement thermostats existed. The record shows that the only way Respondent had any knowledge of any alleged replacement thermostats was a result of receiving the tainted evidence, Exhibit No. 60. At trial, Respondent presented no

other testimony in any fashion whatsoever which would support the claim that Respondent independently possessed knowledge that the alleged replacement thermostats existed. No other writings or memoranda of any nature were received or submitted by Respondent in support of its testimony and any other information was clearly pure hearsay as a result of alleged telephone conversations. This evidence should not have been admitted at trial and forms the only basis for the witness's knowledge. The record does not support independent knowledge on behalf of Respondent's witness on this issue.

WHEREFORE, it is respectfully requested that your Honorable Court grant

the Petitioner's Petition for a Writ of Certiorari and hear the case.

Respectfully submitted



Kenneth C. Sandoe,
Esquire

H. APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FREDERICK L. WRIGHT, et. al.	:	CIVIL ACTION
v.	:	NO. 86-3171
UNITED STATES DEPARTMENT OF AGRICULTURE	:	

MEMORANDUM AND ORDER

HUYETT, JR. JULY 14, 1987

Plaintiffs brought this action against federal and state agencies and officials for damages arising out of the destruction of plaintiffs' poultry and other property.[1] In 1983, an outbreak of avian influenza occurred in Pennsylvania, causing the United States and Pennsylvania Departments of Agriculture to establish a quarantine zone in the Commonwealth. By February, 1984, the quarantine zone included plaintiffs' entire poultry operation.

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[1] The state defendants were dismissed by order dated December 23, 1986.

According to plaintiff's complaint, in March, 1983, plaintiff Fred Wright discovered two Avian Flu Task Force agents on his premises. Plaintiff directed them to leave and subsequently contacted the Pennsylvania State Police, who filed trespassing charges against them. Ultimately, the trespassing charges were dismissed.

Plaintiffs allege that in April, 1984, their birds were tested for avian influenza, and that in June, 1984, they received a copy of the test results showing that no avian influenza virus was present. In July, 1984, defendants informed plaintiffs that they planned to destroy plaintiffs' flock. Plaintiffs claim that on August 1, 1984, defendants appeared on plaintiffs' premises without warning or notice and slaughtered the flock. Plaintiffs further allege that defendants

also caused incidental damage while cleaning and disinfecting plaintiffs' property following the depopulation of the flock. Following the slaughter, plaintiffs claim that defendants completed testing plaintiffs' flock and that the tests showed that the poultry had developed an immunity to the avian flu.

Plaintiffs allege that defendants negligently misdiagnosed their flock and needlessly destroyed their property. Moreover, plaintiffs claim that they have not received fair value for their flock because defendants substantially undervalued it, thus causing a "taking" of plaintiffs' property in violation of the fifth amendment.

The federal defendants move to dismiss the complaint, pursuant to Fed. R.Civ.P. 12(b)(1), on the ground that this court lacks subject matter jurisdiction. For the

reasons stated below, I grant defendants' motion and transfer this case to the United States Claims Court.

In ruling on a motion to dismiss, I must accept as true all well pleaded factual allegations made in the complaint and must resolve all reasonable inferences to be drawn from those allegations in the light most favorable to the plaintiffs. Robb v. City of Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984).

Defendants argue that plaintiffs' claims are barred by the discretionary function exception of the Federal Tort claims Act, 28 U.S.C. Section 2680(a). The Third Circuit has recently held that the discretionary function exception exempts the United States from liability for claims based on (1) discretionary planning level acts and omissions; (2) discretionary operational acts and omissions and (3

BEST AVAIL

non-discretionary operational level acts and omissions taken in furtherance of discretionary planning level decisions. Berkovitz v. United States, slip. op. at 16-17 (3d Cir. June 30, 1987). In considering whether the discretionary exception applies, a court must consider whether "the acts of a Government employee -- whatever his or her rank -- are of the nature and quality that Congress intended to shield from tort liability." United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S.C. 797, 813 (1984). The Court also stated that the discretionary function exception "plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct or private individuals." Id. at 813-14.

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In this case, defendants' authority to act to prevent the spread of avian influenza was derived from 21 U.S.C. Sections 111-113, 114a-1, 115-117, 119-126, 130, 134a, 134b, 134d, 134e, and 134f, and the regulations promulgated pursuant to these statutes. See 9 C.F.R. Section 81.1 - 81.16 (1985) (repealed 50 Fed. Reg. 38969-70 (1985)). A review of these statues reveals that Congress plainly intended to leave to the Secretary of Agriculture's discretion the decision of how to proceed to control a potentially contagious disease. In particular, Congress provided for destruction of poultry "whenever [the Secretary] deems it necessary", 28 U.S.C. Section 134a, or "whenever the Secretary determines that an extraordinary emergency exists". 28 U.S.C. Section 134b. Thus, the decision of when it is appropriate to destroy poultry is

within the Secretary's discretion and the discretionary function exception applies to that decision. Moreover, in exercising this authority, the Secretary is clearly acting in his authority as a regulator of conduct of private individuals.

Plaintiffs argue that at least their claim as to the incidental damage to their other property besides the destruction of their poultry should proceed. However, the alleged actions of defendants which caused the incidental damage were operational acts in furtherance of the planning level discretionary decision to destroy plaintiffs' poultry, and thus the discretionary function exception applies to these acts as well. Berkovitz, slip. op. at 16-17. Because the discretionary function exception acts as a jurisdictional

bar, id. at 6, I must dismiss plaintiffs' claim under the Federal Tort Claims Act for lack of jurisdiction.

Plaintiffs also asserts jurisdiction under 42 U.S.C. Section 1983. Plaintiffs waived any claim against defendants in their individual capacities. See Govt.'s reply ex. 1. Claims against the United States and its agents may not be brought under 42 U.S.C. Section 1983. Accardi v. United States, 435 F.2d 1239 (1970). Moreover, the federal defendants were acting under color of federal, not state, law. Even assuming such a claim could be asserted, the complaint must be dismissed because plaintiffs seek damages from the federal treasury in excess of $10,000 and I have no jurisdiction over this claim under 28 U.S.C. Sections 1346 (a)(2) and 1491. Empire Kosher Poultry, Inc. v. Hollowell, 816 F.2d 907, 912 (3d Cir. 1987).

Finally, plaintiffs contend that defendants' actions constituted a "taking" of their property without just compensation in violation of the fifth amendment of the Constitution because they were not given the fair market value for their flock in violation of 21 U.S.C. Section 134a(d). If the defendants accomplished a regulatory taking, then the Tucker Act provides a just compensation remedy against the United States. Id. at 914 n.6. Plaintiffs challenge the Secretary's valuation of the chickens, and seek damages in excess of $10,000. Thus, exclusive jurisdiction of this claim is vested with the United States Court of Claims under 28 U.S.C. Sections 1346(a)92 and 1491.

In conclusion, I find that I lack jurisdiction over this claim. Thus, I shall transfer the claim against the

federal defendants to the United States Court of Claims pursuant to 28 U.S.C. Section 1631. An order follows.

/s/ Daniel H. Huyett
Daniel H. Huyett, 3rd,
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FREDERICK L. WRIGHT, et. al.	:	CIVIL ACTION
v.	:	NO. 86-3171
UNITED STATES DEPARTMENT OF AGRICULTURE	:	

ORDER

HUYETT, JR. JULY 14, 1987

Upon consideration of the federal defendants' motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(1), plaintiffs' response thereto and the supplemental memoranda, and for the reasons stated in the he attached memorandum, IT IS ORDERED that:

1. the federal defendants' motion to dismiss for lack of subject matter jurisdiction is GRANTED.

2. The action against the federal defendants shall be transferred to the United States Claims Court pursuant to 28 U.S.C. Section 1631.

IT IS SO ORDERED.

/s/ Daniel H. Huyett
Daniel H. Huyett, 3rd, Judge

Frederick L. WRIGHT, III, et al., Plaintiffs,

v.

The UNITED STATES, Defendant.

No. 520-87C.

United States Claims Court.

Feb. 26, 1990.

Owner of poultry flock which had been destroyed because of disease brought action to recover value of the flock and to recover for damage to property during USDA cleanup. The Claims Court, Moody R. Tidwell, III, J., held that: (1) it was improper to value poultry as exhibition birds; (2) the "fair market value" to which the owner was entitled was not limited to its legal definition; and (3) owner was entitled to recover base reparation costs, transportation costs, and progeny value and lost profits.

Ordered accordingly.

1. Administrative Law and Procedure

-744,763

Animals - 32

Review of decision of Secretary of Agriculture as to fair market value of poultry flock which the government has ordered destroyed is not de novo, and claimant must prove that the administrative computation was arbitrary, capricious, an abuse of discretion, or contrary to law. 21 U.S.C.A. Section 134a.

2. Animals - 32

Because owner of poultry was voluntarily cooperating with quarantine of the Pennsylvania Department of Agriculture, action taken by the Secretary of Agriculture leading to destruction of the poultry which did not engender the cooperation of state or local jurisdiction or the cooperation of owner of the poultry

that was to be destroyed was arbitrary, an abuse of discretion, and contrary to law. 21 U.S.C.A. Sections 114a, 134a.

3. Animals - 37

Regulations and action by the Secretary of Agriculture pursuant to statute authorizing seizure and disposal of diseased livestock cannot define the fair market value of that livestock for purposes of determining compensation to owner more narrowly than language in regulations enacted pursuant to the Secretary's authority to control and eradicate disease through the cooperation of the states and farmers' associations. 21 U.S.C.A. Sections 114a, 134a.

4. Animals - 37

For purposes of determining compensation to owner of poultry which is destroyed because of disease, the term

"fair market value" is not limited to its legal definition. 21 U.S.C.A. Sections 114a, 134a.

5. Animals - 37

It was improper to value poultry which was destroyed because of disease on the basis of its value as exhibition birds. 21 U.S.C.A. Sections 114a, 134a.

6. Animals - 37

In determining value of poultry destroyed because of disease, the "fair market value" was to be based on the base reparation costs, transportation costs, and progeny value and lost profits where the owner was a breeder of poultry. 21 U.S.C.A. Sections 114a, 134a.

7. Animals - 37

BEST AVAIL

Owner of poultry which was destroyed because of disease was not entitled to recover progeny value for 27 years where there was no showing that the birds were irreplaceable.

8. Animals - 37

Owner of poultry which was destroyed because of disease was entitled to recover for damage to his premises and equipment caused by the United States Department of Agriculture in cleaning the premises pursuant to agreement under which the USDA undertook the cleaning because the owner was financially unable to perform the cleanup himself.

Kenneth C. Sandoe, Myerstown, Pa., for plaintiffs.

Richard P. Nockett, Washington, D.C., with whom was Acting Asst. Atty. Gen. Stuart E. Schiffer, for defendant, Thomas E. Bundy, of counsel.

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OPINION

MOODY R. TIDWELL, III, Judge:

Plaintiff requests review of the Secretary of Agriculture's determination of fair market value of plaintiff's poultry flock following the flock's destruction at the Secretary's order. Plaintiff also seeks redress for property damages or destroyed by defendant during the subsequent cleaning and disinfecting of plaintiff's premises.

FACTS

In 1983, plaintiff Frederick L. Wright was a successful poultry breeder. He had begun his own chicken farm following college and over the years had expanded his operation to include not only the normal raising of chickens for their meat and egg production but also breeding prize winning breeder chickens and a large variety of other birds. During this time frame,

plaintiff had worked closely with Mr. henry K. Miller, an internationally recognized producer of quality, prize winning birds. Plaintiff served as Mr. Miller's clerk for eight years. Ultimately, Mr Miller entrusted plaintiff with the preservation of the recognized "miller" bloodlines which represented the culmination of Mr. Miller's lifetime of work. Using Mr. Miller's bloodline, plaintiff later started his own bloodline, colloquially known as the Miller-Wright strain.[1]

By April, 1983, plaintiff's business was successful and he had incorporated as Fred L. Wright, Inc. with three operating

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[1]The creation and preservation of recognized bloodlines is an involved process requiring extensive bio-security, genetic selection, isolation of bloodlines during the breeding season, and selection of the day-old chicks for their value as breeders, exhibition or general sale. The entire process of creating a new recognized bloodline takes approximately twenty years of breeding under these exacting requirements.

divisions: the Willow Hill Hatchery, the hatching operation that provided the checks for plaintiff's other operations; the Day Old Bird Business, the selling operation that sold the day old birds; and Willow Hill Poultry Farms, the breeding operation that produced hatching eggs for the Willow Hill Hatchery (including also a dressing plant, Willow Hill Poultry, dealing mainly in game birds). Fred L. Wright, Inc. owned two farms located in Berks County, Pennsylvania. The home farm, site of Willow Hill Poultry, Willow Hill Poultry Farms, and the Day Old Bird Business, was located approximately two-and-one-half miles south of Bethel, Pennsylvania. The airport farm, site of Willow Hill Hatchery and a slaughterhouse, was located approximately two-and-one-half miles northwest of Bethel, Pennsylvania.

The evidence presented to the court established that in 1982, one year before the incidents surrounding this action began, plaintiff had an excellent reputation as a breeder. Plaintiff's Day Old bird Business shipped 250,000 to 300,000 birds a year to over 10,000 customers located on every continent save Antarctica and Australia. Mr. Wright also successfully exhibited his birds at fairs and shows as a hobby but more importantly as a marketing tool for the sale of his breeder birds.

All this was threatened in April of 1983, however, when there occurred an outbreak of a highly contagious viral disease in Lancaster county, Pennsylvania which the United States Department of Agriculture (USDA) later identified as "lethal avian influenza." The Pennsylvania Department of Agriculture (PDA) acted first

by quarantining premises in Lancaster County where infected poultry were found. The PDA's action, unfortunately, was not enough to contain the outbreak, and by late October, 1983, the disease had continued to spread within the quarantined areas killing many poultry flocks.

On November 4, 1983, the USDA, legitimately concerned that the continuing spread of avian influenza would affect poultry flocks even further afield, quarantined portions of Berks, Dauphin, Lancaster and Lebanon Counties in Pennsylvania. The USDA's quarantine prohibited interstate movement of poultry and certain related articles from the outlined area. The PDA harmonized its efforts with the USDA by enacting its own even stricter regulations that disallowed movement into, out of, or within the

quarantined area.[2] The initial USDA quarantine enveloped plaintiff's home farm and had a serious impact on his business.[3] On November 9, 1983, the Secretary of the USDA declared that an "extraordinary emergency" existed in Pennsylvania due to the outbreak of the virus. Following this declaration, the statute authorized the Secretary to "seize, quarantine, and dispose of [infected] poultry and other items ... to ... carry out the provisions of ... 21 U.S.C. 134-134h...." 9 C.F.R. Section 81.10 (1984). One week later, the USDA issued regulations expanding the

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[2]These harmonizing actions by PDA were interwove with 21 U.S.C. Section 114a and its accompanying regulation at 9 C.F.R. Section 53.2 (1984). This court had earlier found that the referenced statute and its regulations must be read in conjunction with a later, more narrow authorizing statute at 21 U.S.C. C. Sections 134-134h and its regulations at 9 C.F.R. Sections 81.1-.15 (1984). Wright v. United States, 14 Cl.Ct. 819 (1988).

[3]Plaintiff's airport farm initially escaped the quarantine.

earlier interim regulations to implement their program to control, eradicate, and prevent the further spread of avian influenza.

By February of 1984, the quarantined areas in Pennsylvania, which had originally included only plaintiff's home farm, had spread to include plaintiff's airport farm. Accordingly, plaintiff's business, which had been severely affected by the earlier quarantine, was now completely stopped.

Although plaintiff's flock had initially shown no signs of exposure, a subsequent test in June, 1984 indicated that at least part of plaintiff's flock had been exposed to the virus. Under the regulations, this necessitated the destruction of plaintiff's entire flock followed by reimbursement at the fair market value, and the cleansing of his facilities. In preparation for the

destruction, USDA retained an outside expert to appraise and determine "the fair market value [of the flock] at the time of destruction...." 9 C.F.R. Section 81.14 (1984). Fair market value was to be "determined by the meat, egg production, dairy or breeding value ..." of the animals destroyed. 9 C.F.R. Section 53.3(b) (1984). Despite these regulations, the USDA instructed its expert to evaluate the birds on their fair market value as exhibition birds. An appraisal on this basis was done on July 7, 1984 with plaintiff and his own expert accompanying defendant's expert. The two expert appraisers testified to the exhibition value of plaintiff's flock at the time of its destruction. Although this circumstance would appear to give their respective evaluations great validity, the fact is that there was no statutorily

designated basis to evaluate the flock as exhibition birds. Both experts followed the USDA ad hoc evaluation instructions even though both experts knew that they were not looking at exhibition birds and that plaintiff's flock's value was not as exhibition birds but as breeder birds.

Sixteen days later, on July 23, 1984, USDA ordered plaintiff to destroy his flock by July 26, 1984. At trial it was evident to the court that at the time plaintiff received the USDA's destruction order, plaintiff believed that defendant was willing to discuss the possibility of saving that part of plaintiff's flock which had not been exposed to the virus. In accordance with this belief, plaintiff did not destroy his flock as ordered. Defendant reacted to plaintiff's failure to immediately comply with the destruction order by obtaining a court order to destroy

plaintiff's flock. On August 1, 1984, defendant entered upon plaintiff's farms with two federal marshalls, four state police officers and seventy-five other federal employees who destroyed plaintiff's flock, sheep, pigs and pet dogs. In compensation for its destruction of Mr. Wright's flock, defendant offered $33,025.44 by letter dated August 14, 1984. Plaintiff rejected the offer as inadequate.

Pursuant to regulation, the USDA also required plaintiff to clean and disinfect his premises before the quarantines placed on his properties could be lifted. Plaintiff, however, could not bear the cost to clean and disinfect his farms because he had been out of business from the preceding November and missed his biggest selling season, from May to the end of July. The PDA attempted to help plaintiff clean his premises in September of 1984, but this

attempt was unsuccessful due to a dispute about the manner in which the clean-up was to be accomplished. consequently, on October 4, 1984, USDA issued a formal order to plaintiff to clean and disinfect his premises. Regardless of the USDA's order, plaintiff's financial situation made it impossible for him to comply. On March 28, 1985, plaintiff and the USDA negotiated an agreement whereby defendant would clean and disinfect plaintiff's premises at defendant's expense. The agreement stated that the on-site director of the government clean-up team would be responsible for deciding which items could be cleaned and disinfected and which would have to be destroyed. The government clean-up operation began on March 29, 1985 and was completed on April 20, 1985. The quarantines on plaintiff's premises were finally lifted on May 21, 1985.

On June 5, 1985, plaintiff submitted separate claims to the USDA pursuant to two separated but related sections of the governing regulations. Plaintiff sought approximately $1.9 million in damages for the destruction of his flock and approximately $39,000.00 for property damages caused by the USDA's cleaning operation. Plaintiff's $1.9 million claim was rejected by letter on September 27, 1985. His property claim was never considered nor acted upon by the USDA.

After exhausting his administrative remedies, plaintiff in June of 1986 filed suit in the United States District Court for the Eastern District of Pennsylvania seeking compensation for the destruction of his flock and for property damage done during the government's clean-up operation. Because the district court lacked jurisdiction under 28 U.S.C. Section 1451,

it transferred the case to the United States Claims Court. Wright v. United States Dept. of Agric., No. 86-3171, 1987 WL 13756 (E.D. Pa. July 14, 1987). In Wright v. United States, 14 Cl.Ct. 819, 824 (1988), this court dismissed plaintiff's constitutionally-based due process, equal protection, and takings claims for lack of jurisdiction. At that time, this court concluded that the appraisal regulations at 9 C.F.R. Section 53.3(b) and 9 C.F.R. Section 81.14 (1984) were to be considered together in reviewing the Secretary of Agriculture's determination of the fair market value of plaintiff's flock. Read together, these statutes mandated that plaintiff's flock be evaluated on the basis of the flock's "fair market value ... determined by meat, egg production ... or

breeding value ..." at the time of its destruction. 9 C.F.R. Sections 53.3, 81.14 (1984).

In December of 1988, defendant instructed its expert to re-appraise plaintiff's flock on proper statutory grounds, i.e., on the basis of the flock's breeder value. Defendant's expert complied as well as he could, although he expressed the opinion that it was impossible to accurately re-evaluate the flock on different grounds so many years later. Defendant's expert did, however, provide a figure which he testified at trial represented re-appraisal of plaintiff's entire flock as breeder birds.

On March 10, 1989, this court, mindful of the December, 1988 re-evaluation, remanded the evaluation again to the Secretary for yet a third evaluation. Because expert testimony during discovery

had produced estimates ranging from $33,025.44 to $110,130.00, the remand order directed the Secretary to consider the opinions of all expert testimony provided to the government through discovery, as well as any other expert or experts the Secretary wished to consult. On April 14, 1989, the Secretary issued its third evaluation. USDA stated that it had considered all the evaluations produced through discovery as well as the evaluation of another expert retained for purposes of complying with this court's order. The third evaluation found that the government's original evaluation was the most fair since that expert had actually seen the flock closest to the time of its destruction. To that expert's original figure of $33,025.44, the Secretary added $1,340.00 which represented that expert's

December, 1988 re-evaluation of plaintiff's flock allegedly based on proper statutory grounds.

The parties continued to trial on the following issues: 1) whether the Secretary of Agriculture's evaluation of plaintiff's flock was arbitrary, capricious, an abuse of discretion or contrary to law; and 2) whether defendant was liable under the statute to compensate plaintiff for damages done to plaintiff's property during the cleaning and disinfecting operation.

DISCUSSION

[1] Although this court can exercise judicial review of the Secretary of Agriculture's decision as to the fair market value of plaintiff's flock, that judicial review is not de novo. Therefore, plaintiff must prove that "the administrative computation, as applied to it, was arbitrary, capricious, an abuse of

discretion, or contrary to law." Julius Goldman's Egg City v. United States, 556 F.2d 1096, 1099, 214 Ct.Cl. 345 (1977), cert. denied, 464 U.S.C. 814, 104 S.Ct. 68, 78 L.Ed.2d 83 (1983) (cited as Egg City I).

> [I]in a case like this, the Department [of Agriculture] does not have discretion whether or not to pay nor can it decide for itself that something other than "fair market value" shall be awarded....[T]he measure of fair market value shall be "as determined by the Secretary." Those words...go to show that...the court cannot substitute its own discretion for properly exercised administrative discretion. But the language does not carry the further burden of making the Secretary's

> exercise of his discretion conclusive even though he abuses it, acts arbitrarily or capriciously, or fails to follow the statutory standard by refusing to grant a reasonable fair market value.

Id. (quoting 21 U.S.C. Section 134a(d)).

I. Evaluation of Plaintiff's Flock

Defendant argued that the Secretary of Agriculture acted entirely within the authority provided by 21 U.S.C. Section 134a. Defendant proposed that after declaring that an emergency existed, the Secretary properly exercised his authority to promulgate regulations to enable the USDA to control and eradicate avian influenza. See 9 C.F.R. Sections 81.1-.15 (1984).

The initial disputed issue that arose was whether 9 C.F.R. Sections 81.1-.15 represented the controlling regulations for the purposes of this action. This court answered that question in Wright v. United States, 14 Cl.Ct. 819, 823-24 (1988). This court held that both 21 U.S.C. Section 134a and 9 C.F.R. Sections 81.1-.15 should be read in conjunction with 21 U.S.C. Section 114a and 9 C.F.R. Sections 53.1-.10. Wright, 14 Cl.Ct. at 823-24. In that earlier decision this court focused primarily on whether there were grounds for granting summary judgment.

Defendant argued that the legislative history of section 134a supported its contention that the use of the term "fair market value" in the he statute meant that Congress had intended the specific, settled and well-known legal meaning of that phrase. Further, defendant contended that

case law supported its contention that section 134a was distinct from section 114a and, therefore, fair market value had a distinct meaning under section 134a without regard to other laws.

A. The Proper Statutory Basis

The basic form of compensation to owners of livestock destroyed at government order, contained in 21 U.S.C. Section 114, was first enacted into law on May 29, 1884 as chapter 60 section 3, 23 Stat. 32 (1884). Section 114a, which provides for the payment of claims to the owners of poultry destroyed by the government through a government effort to eradicate communicable diseases, was first added to this law on September 21, 1944. 21 U.S.C. Section 114a (1982). Later, because "[e]xhisting basis authority (act of May 29, 1884, as amended) provides for payment of claims for the destruction of animals

and poultry affected by or exposed to diseases, but makes no provision of payment for the destruction of material affected by or exposed to such diseases," Congress expanded section 114a on August 3, 1956 to include payment for those materials destroyed pursuant to a government mandated eradication program. H.Rept. No. 2732, 84th Cong., 2d sess (1956). Gaps that remained in the statutory scheme were addressed by Congress in 1962 when Congress enacted 21 U.S.C. Section 134, to wit:

> The general effect and purpose of this bill is twofold: (1) To extend to all communicable diseases of livestock and poultry, authority of the Secretary to deal with emergency situations arising from outbreaks of such diseases, such as he now has with respect to specific

> diseases in numerous separate laws; and (2) to charge the Secretary of Agriculture with the general duty and responsibility of preventing the entry of dissemination of communicable diseases of livestock and poultry, so that he may take action before an emergency arises.

H.Rept. No. 1518, 87th Cong., 2nd sess (1962). The Senate report likewise states that:

> The bill ... is designed to close a number of gaps which have shown up in the animal quarantine laws and to clarify authority for certain actions under such laws. Those laws have been enacted from time to time to meet particular situations. They are applicable

to specific animals, diseases, or circumstances, and fail to cover, or provide different authority with respect to, other animals, diseases and circumstances where there is a need for uniform, broad authority. The bill is designed to provide such authority for all cases of like need....

The bill would increase the Secretary's seizure authority; clarify his authority to restrict imports; increase authority for inspection and for sanitary regulations, and provide injunction authority. The purpose of the bill is to provide adequate safeguards for the

> protection from disease of our domestic livestock and poultry industry.

S.Rept. No. 582, 87th Congress, 1st sess (1961).

The language of section 134a is clear that "the statute's purpose is to give the Secretary continuing authority for disease control and eradication ... allowing him to take swift action to eliminate the inherent dangers of contagious livestock diseases." Egg City I, 556 F.2d at 1100. Defendant, therefore, argued too broadly that this section provided the only statutory authority under which the Secretary acted in this emergency. Defendant pointed to no language in the statute itself or in the legislative history, nor can this court find any such language, supporting defendant's assertion. In addition, this court finds that even though the

Secretary's authority under section 134a is extraordinary, congressional intent is clear that "the purpose of the indemnity is ... to engender owner cooperation with the Secretary's efforts." Id. Accordingly, section 134a does not allow the Secretary to act in those states where "adequate measures are ... being taken by the State or other jurisdiction." 21 U.S.C. Section 134a(b) (1982). Furthermore, whatever the circumstances, the Secretary is required to "notify the appropriate official of the State or other jurisdiction before any action is taken in any such State or other jurisdiction pursuant to this subsection." Id. The requirements, therefore, relate the Secretary's actions pursuant to section 134a back to the clear congressional purpose of engendering cooperation as stated in section 114a.

[2] The evidence presented to the court clearly showed that the beginning stages of this emergency were accomplished under 21 U.S.C. Section 114a, not 21 U.S.C. Section 134a. The Secretary's authority and power under title 21 U.S.C. Section 134a did not become effective until the November 9, 1983 declaration that an emergency existed and that the state of Pennsylvania was unable to meet the threat. By November 9, 1983 when the Secretary was first able to invoke his extraordinary powers enumerated in section 134a, plaintiff was already voluntarily cooperating under the PDA's quarantine and only after that November declaration could the USDA and PDA roles reverse. Indeed, the USDA's first action was to promulgate regulations in harmony with already existing PDA quarantines. It would therefore be unreasonable as well as

contrary to discernable congressional intent if the voluntary cooperation with government authority begun under one statute (section 114a) were to be totally ignored and disregarded by the Secretary of Agriculture's subsequent actions under a later statute (section 134a). Therefore, we hold that the actions taken by the Secretary in this case which did not engender the cooperation of the state or local jurisdiction involved or the cooperation of the owners of the poultry that was to be destroyed were contrary to congressional intent expressed in the narrower, applicable section 114a; therefore, these actions were arbitrary, an abuse of discretion, and contrary to law.

[3] Defendant also argued that "fair market value", legally defined as the amount a willing buyer would pay a willing seller, was limited by Congress' later use

of those words in enacting the Secretary's broader powers under section 134a. However, upon examination, defendant's argument fails for three reasons. First, reading the statutes and regulations as defendant argues would be contrary to congressional intent as arbitrarily limiting the compensation due plaintiff to the legal definition of fair market value might not induce the cooperation of farmers with the government mandated destructions. The facts of this case clearly show that plaintiff would never have cooperated with the USDA at all in its attempts to eradicate avian influenza, much less allow the USDA to destroy his flock, had plaintiff known the apparently nominal amount of compensation he would eventually be offered in compensation for the destruction of his flock. Implicit in plaintiff's grudging cooperation with the

USDA's efforts was his belief that he would be treated fairly by the government and receive what he considered adequate compensation for the damages done pursuant to the USDA's actions. Second, the language of the statute itself does not limit the compensation to the legal term of art of fair market value. See Johns-Manville Corp. v. united States, 855 F.2d 1556, 1559 (Fed.Cir.1988), cert. denied, ___ U.S.C. ____, 109 S.Ct. 1342, 103 L.Ed.2d 811 (1989); Wright, 14 Cl.Ct. at 822-23.[4] Third, as pointed out in this court's earlier order, the regulations of section 114a (enacted in 1956) determine fair market value more narrowly than the later regulations of section 134a (enacted in 1962) by specifically defining the basis for a fair market value determination.

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[4]This does not suggest that the legal definition of fair market value can never be sufficient under section 53.3(b).

Therefore, the general language of the regulations of section 134a can not properly be interpreted as defining fair market value more narrowly than the specific language in the regulations of section 114a.

[4] Defendant's last argument was that the legislative history does not foreclose USDA's interpretation of the statute and that USDA's interpretation is reasonable and therefore must be upheld by the court. See Chula Vista City School Dist. v. Bennett, 824 F.2d 1573, 1582 (Fed.Cir.1987), cert. denied, 484 U.S.C. 1042, 108 S.Ct. 774, 98 L.Ed.2d 861 (1988). We hold, however, that the clear intent as shown by the congressional history does not support defendant's argument. This holding is consistent with other courts' determinations that the purpose of the indemnity regulation was "to encourage

owners of infected or exposed poultry to destroy their birds, thereby reducing the spread of the disease." Empire Kosher Poultry, Inc. v. Hallowell, 816 F.2d 907, 914 (3rd Cir.1987); see also Egg City I, 556 F.2d at 1100. In addition, this court's determination is consistent with the Supreme Court's conclusion that fair market value, as limited to its legal definition, may not always be appropriate.

> The Court therefore has employed the concept of fair market value to determine the condemnee's loss. Under this standard, the owner is entitled to receive "what a willing buyer would pay in cash to a willing seller" at the time of the taking. United States v. Miller, [317 U.S.C. 369, 374, 63 S.Ct. 276, 280, 87 L.Ed. 336 (1943).]...[T]he

concept of fair market value has been chosen to strike a fair "balance between the public's need and the claimant's loss" upon condemnation of property for a public purpose. United States v. Toronto, Hamilton & Buffalo Nav. Co., 338 U.S.C. 396, 402 [70 S.Ct. 217, 221, 94 L.Ed. 195] (1949)....

But while the indemnity principle must yield to some extent before the need for a practical general rule, this Court has refused to designate market value as the sole measure of just compensation. For there are situations where this standard is inappropriate.

United States v. 564.54 Acres of Land, 441 U.S.C. 506, 511-12, 99 S.Ct. 1854, 1857, 60 L.Ed.2d 435 (1970)(supplemental citations omitted).

However, the full thrust of defendant's argument cannot be disposed of this easily. Defendant further argues that, since this is USDA's determination of its own regulation, great deference must be afforded that determination. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S.C. 837, 843-44, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). As a general proposition, defendant's assertion holds true. However, where the agency determination is contrary to clear congressional intent, the "judiciary is [to be] the final authority...." Id. at 843 n. 9, 104 S.Ct. at 2781 n. 9. Moreover, defendant's argument is flawed because the Department of Agriculture has not limited

its own use of the two statutes in combination to this "legal definition" of fair market value. See Julius Goldman's Egg City v. United States, 697 F.2d 1051 (Fed.Cir.), cert. denied, 464 U.S.C. 814, 104 S.Ct. 68, 78 L.Ed.2d 83 (1983) (cited as Egg City II).[5] This court finds, therefore, that the combination of: 1) the congressional intent to encourage those injured by government destruction to assist the government in its greater effort to eradicate the disease by fair compensation, 2) the consistent findings of courts that fair market value, notwithstanding the fact that it has a settled legal meaning, cannot mean a value that fails to provide adequate compensation, and 3) the Secretary of Agriculture's earlier actions under these

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[5] In Egg City II, the Court of Appeals for the Federal Circuit held that it was proper for the Secretary to even include a measure of profits in determining a fair market value compensation. Egg City II, 697 F.2d at 1055.

same statutes, described in Egg City I and Egg City II, makes it impossible for this court to find the Secretary's actions in the present case reasonable. Therefore, defendant's argument fails and the court need not and will not give deference to the agency's determination of fair market value in the present action.

B. The Determination of Fair Market Value

[5] The next question, this court must answer is whether the regulations at 9 C.F.R. Sections 53.3 and 81.14 (1984), applicable to this case, were properly administered by the Secretary of Agriculture. The facts presented at trial unequivocally showed that both defendant's and plaintiff's on-site experts were instructed by an unknown USDA official to evaluate plaintiff's flock not on any statutorily recognized basis but as exhibition birds. The applicable

regulations would have required fair market value to be determined "at the time of destruction" of the flock, 9 C.F.R. Section 81.14 (1984), and "by the meat, egg production ... or breeding value" of the flock. 9 C.F.R. Section 53.3(b) (1984). Nowhere in the statutes, sections 114a or 134a, nor the implementing regulations, 9 C.F.R. Sections 53.3 and 81.14, were there any instructions for evaluating poultry on the basis of its exhibition value. therefore, the Secretary of Agriculture did not properly administer the applicable regulations in this case.

Furthermore, the Secretary's actions were contrary to congressional intent. As this analysis has shown the legislative purpose of section 134a was to give the Secretary of Agriculture extraordinary powers to act when necessary to protect the poultry industry. In order to encourage

breeders who would be injured by the government's emergency actions to assist the government in its objectives to restore the industry to its former place as quickly as possible, the Secretary was mandated by Congress to compensate the farmers for their loss. If the compensation offered by the Secretary were inadequate, however, the Secretary would obviously face opposition to his actions, there would be unwarranted delay in restoring the the breeders and the industry to its former place, and congressional intent would not be served.

[6] Finally, the statutory language quoted above did not, as defendant asserted, limit compensation to a ceiling price equal to the generally acceptable legal term of art "fair market value." Instead it set that value as a minimum basis for compensation. Although defendant was correct in stating that the concept of

fair market value was one well recognized in law and that the use of that term in the statute suggested that Congress meant the legal term of art, defendant is not saved from following the entirety of the statute's mandates which include section 114a where the specific grounds for evaluation are enumerated. Because the USDA did not evaluate plaintiff's flock on the basis of their egg, meat or breeder value, it was therefore necessary for the court to determine the factual question as to what constituted "fair market value" for a poultry breeder in plaintiff's circumstances under the applicable law. There was much evidence presented at trial on this issue by expert testimony, applicable court precedent and the Secretary's prior actions. This evidence focused on three elements to be considered in determining "fair market value" for

plaintiff's birds: 1) the base reparation cost; 2) transportation costs; and 3) progeny value and lost profits.

1. Base Reparation Cost

A range of values for plaintiff's flock, from a low of $33,025.44 to a high of $113,631.75, was provided to this court by a total of six expert witnesses, two for plaintiff and four for defendant. The lower values, falling within a range of $33,025.44 to $45,329.50, were provided by defendant's experts. Testimony suggested this range of values might be consistent in that it represented reasonably differing values that individual judges might provide when looking at the same birds. Plaintiff's experts provided valuations of $110,130.00 and $113,631.75. The discrepancy between the two ranges was due to plaintiff's experts including transportation costs as part of their

valuation while defendant's experts limited their valuations to the price a willing buyer would pay a willing seller, or the legal term of art definition of fair market value. It has already been shown that under the facts of this case, this legal term of art limitation was faulty. It remains for the court, however, to determine the proper base reparation cost of plaintiff's flock. Transportation costs have two components; 1) the cost of finding a suitable replacement bird, including reasonable transportation costs necessary to travel to and from a particular location to see the bird for purchase; and 2) the actual cost of shipping the bird from the seller to the buyer. Testimony showed that this last component can be substantial.

The defense experts' re-evaluations of plaintiff's flock on proper statutory grounds, i.e., as breeder birds, following this court's remand order of March 10, 1988, produced greater harmony in their final figures. Mr. Bortner, defendant's original appraiser, re-evaluated plaintiff's flock and increased the value of his earlier evaluation to $34,365.44. The Secretary determined that because Mr. Bortner had actually seen the flock just before its destruction, and neither plaintiff's experts or the Secretary's remand experts had seen plaintiff's flock for several years if at all, Mr. Bortner's testimony was the most credible in arriving at a fair market value of plaintiff's flock. While the Secretary's conclusion appears reasonable, Mr. Bortner's testimony and demeanor at trial left this court in great doubt as to whether he actually re-

evaluated plaintiff's entire flock or merely appeased the Secretary by raising the value of a few birds. His reappraisal letter to the Secretary cast considerable doubt on his re-evaluation. It stated:

> Having reviewed the enclosed file on my initial appraisal of the Avian Flock of Mr. Fred Wright, on July 7, 1984, I find very little that I can honestly re-appraise.
>
> As stated on all the forms carrying my signature, the "Value was based on Market Value of EXHIBITION Poultry...."
>
> I can not [sic] in all sincerity evaluate any of these birds ... as breeders.... I personally do not think anyone can do that.

Letter from B.R. Bortner to USDA (December 27, 1988) (emphasis in original). Mr. Bortner's testimony at trial was conflicting on this point, although in the end he asserted that he did indeed evaluate all of the birds as breeders. The inconsistency in his testimony on two different days and his final assertion that he did evaluate the whole flock as breeders combined with his inability to explain the plain meaning of his letter written at the time of his re-appraisal, persuaded the court to discount his testimony on this issue. The court was simply not convinced that Mr. Bortner ever evaluated plaintiff's entire flock on proper statutory grounds.

Two other defense experts, Mr. Arthur Schallenberg and Mr. John Wunderlich, agreed with Mr. Bortner's evaluation. Mr. Schallenberg served as plaintiff's expert at the original evaluation of the flock.

While this would appear to lend credibility to Mr. Schallenberg's evaluation, at trial it became clear that Mr. Schallenberg had not valued plaintiff's flock on July 7, 1984 as breeders nor had he ever evaluated plaintiff's flock for their breeder value. In addition, Mr. Schallenberg testified that at the time of evaluation he could see no greater value in the flock as breeders than as exhibition birds. This testimony was inconsistent with the testimonies of other experts which the court found more credible.[6] The testimonies of the other

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[6]Defendant also argued, and testimony provided, that in the industry exhibition birds and breeder birds can mean the same thing as exhibition birds represent the best product of a breeder's output and may be used, after exhibition, to breed more poultry. The court was persuaded, however, that this was not true in plaintiff's situation as expert testimony convincingly demonstrated that an evaluation of plaintiff's flock as breeder birds would be substantially higher than an evaluation of plaintiff's flock as exhibition birds. Oftentimes non-exhibition birds produce the best exhibition birds and, conversely, exhibition birds do not necessarily produce

experts who agreed on these latter points were very convincing to the court. Because Mr. Schallenberg's testimony was inconsistent with other credible expert testimony, the court discounted his contradictory testimony. Mr. Wunderlich, who did not testify at trial, was retained by the Secretary after the court had remanded the valuation decision to the Secretary. Mr. Wunderlich deferred heavily to the opinions of Mr. Bortner and Mr. Schallenberg in his written evaluation of plaintiff's flock because those experts had seen plaintiff's flock within a month of its destruction. Like defendant's other witnesses, there was little evidence, if any, showing that Mr. Wunderlich ever evaluated plaintiff's flock independently on their value as breeders. Also, because of the lack of credibility of Mr. Bortner's

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exhibition birds.

and Mr. Schallenberg's evaluations which served sa the basis for Mr. Wunderlich's evaluation, the court cannot accept Mr. Wunderlich's opinion as a basis for a fair market valuation.

The only defense expert who testified unequivocally that his evaluation was done on the basis of plaintiff's flock being breeders was Dr. John L. Skinner. Dr. Skinner was retained by the Secretary as an expert pursuant to this court's March 10, 1989 remand order. Dr. Skinner did not testify at trial. The quality of his written testimony, however, was quite apart from defendant's other experts. Defendant's other experts' testimonies were very confused, leaving the court wondering whether a fair evaluation on the proper basis was or could have been done at any time. The testimony of Dr. Skinner, on the other hand, provided the court with

valuation figures from which an accurate assessment could be made. Dr. Skinner displayed independent understanding of the breeder industry and the condition of plaintiff's birds at the time of their destruction. His testimony was clear and unequivocally showed that he evaluated plaintiff's flock on the basis of their breeder value and determined that the fair market value of Mr. Wright's flock at the time of its destruction was $45,676.50. Because of his forthrightness and expertise, the court accepted in part Dr. Skinner's evaluation as a basis for determining fair market value. His evaluation, which did not include transportation costs that he testified should be included in a final fair market valuation, was useful and instructive to the court. See Letter from Dr. John L. Skinner to USDA (March 23, 1989).

2. Transportation Costs

Defendant argued most strenuously that the law does not require compensation of transportation costs incidental to a breeder's repopulation of his flock. The court is convinced however, that had the Secretary properly evaluated plaintiff's flock in July, 1984 as breeder birds, then transportation costs would have suggested themselves as a necessary element of the fair market value compensation due plaintiff. The majority of expert witnesses at trial, both for defendant and for plaintiff, agreed that they expected transportation costs to be paid in these circumstances. Mr. Bortner, defendant's primary expert, said: "I would expect the government to pay it all." Tr. at 396. Dr. Skinner, another defense expert whom the defense found highly credible, stated in his letter that one of the factors to be

considered above and beyond the cost of similar replacements was the "[t]ransportation of those replacements to Mr. Wright's premises." Letter from Dr. John L. Skinner to USDA (March 23, 1989).

Plaintiff's experts included transportation costs as necessary costs in their valuations of plaintiff's flock while defendant's experts did not. The person apparently most responsible for defendant's confusion on this issue was Dr. Lonnie King, the Deputy Administrator for Veterinarian Services for the Department of Agriculture in charge of the avian influenza eradication program. This confusion was evidenced in the following conversation between the court and Dr. King.

> THE COURT: During your testimony, you actuated [sic] fair market value as being

replacement costs. I believe that you said and this is probably not a direct quote, "Fair market value would be the amount of money that Mr. Wright could repopulate his flock with." Is that an accurate statement?

THE WITNESS: With equal type of bird with equal quality.

THE COURT: Okay. But, then, you went on to say that would not include transportation. This is a quote. "It is part of the fair distribution system between buyers and sellers." Now, is that inconsistent?

THE WITNESS: I do not think that it is, Your Honor. I thank that market value is what I defined it as getting the birds back and

forth to people. It is just my judgment that was not inconsistent.

THE COURT: In other words, Mr. Wright could repopulate his flock as long as he left the flock with the seller, but he could not bring it to Pennsylvania, is that correct?

THE WITNESS: He would have to bring it to Pennsylvania.

THE COURT: Oh, you are going to have to make up your mind now. Are you going to pay him the transportation cost and let [him] repopulate his flock or are you going to make him have a smaller flock? Someone has to pay the transportation cost. Now, if you say that the fair market value is the replacement cost of that

flock, then, do you have to include transportation [in] fair market value?

THE WITNESS: I just do not think so. I understand your reasoning, but that seems to be the part of doing business. People buy and sell birds, livestock, all of the time.

THE COURT: Yes, but the Department of Agriculture here destroyed his flock. They are mandated to pay him the fair market value. You said that fair market value is the replacement cost. The replacement cost must include transportation, should it?

THE WITNESS: I do not think so, Your Honor.

THE COURT: You keep saying that, but you will not tell me why?

THE WITNESS: Because, I do not think that is part of the value.

THE COURT: Well, how does Mr. Wright replace his flock with the same number of birds and the same quality base upon your definition of fair market value?

THE WITNESS: I am assuming that under those circumstances, he would pay for the transportation.

THE COURT: How can you say that?

THE WITNESS: It is not part of the fair market value....

THE COURT: I have lost the logic of replacement as being fair market value, but no really being able to replace the birds you cannot afford to ship ... to your farm ... the reason being that

the Government destroyed your birds and refuses now to give you enough money to rebuild your flock?

THE WITNESS: I just [see] them as two different indemnities. One [is] fair market value that we talked about in the appraisal, and one is the transportation cost, that I just have not connected in one indemnity.

THE COURT: Tell me how he rebuilds his flock, then? I will repeat that question.

THE WITNESS: You go though the appraisal value. You have to find these birds and pay for them, and your point is and I think that is the fair market value of those birds. Your point is, how do you get them from

point A to point B to his premises? I assume that has been the cost borne by Mr. Wright or whoever.

THE COURT: Who caused that cost?

THE WITNESS: Who caused the Avian Influenza?

THE COURT: No, who caused the cost, the transportation cost in rebuilding Mr. Wright's flock?

THE WITNESS: We depopulated his flock. If he is going to go back into business, obviously, that id directly related to his depopulation.

THE COURT: So, it is the Department of Agriculture's fault, in a sense. Not guilt, but the Department of Agriculture caused that cost to be raised as a factor....

I do not know if you ever told me what fair market value was?

THE WITNESS: It is the replacement of that bird of equal quality, same breeding.

THE COURT: But, none of the costs of making sure that it is the same bird and the same quality, none of the costs--

THE WITNESS: The same quality. Not the cost of getting it there.

Tr. at 571-76. Dr. King was authorized by the Secretary of Agriculture to determine the fair market value of plaintiff's flock. It is obvious that Dr. King arbitrarily and perhaps capriciously decided that transportation costs should not be included in a fair market valuation. Based on the clear weight of expert evaluations and opinions, the court found

that these actions were not reasonable. Transportation costs should have been included at least in the circumstances of this case as part of the Secretary's determination of fair market value to repopulate plaintiff's flock of breeder birds. For a breeder of specialty poultry, especially one who is developing bloodlines and keeping particular breeds alive, credible testimony at trial showed that transportation costs can vastly exceed the price of a particular bird, even a rarer bird. Plaintiff provided the expert testimony of two witnesses as to these transportation costs. Mr. Hans Schippers, a breeder from Holland, provided testimony which was, in general, most instructive and helpful to the court. But, it was evident that Mr. Schippers provided European market values for replacing and transporting plaintiff's flock, not United States market

costs. Because there is no way for this court to determine what Mr. Schippers' figures might be in the United States market, the court rejected his figures as a basis for fair market value. However, his testimony concerning 1) breeder value as opposed to exhibition value, 2) plaintiff's flock and reputation in Europe, and 3) his opinion that transportation costs should be paid because of the great discrepancy in costs between replacement and transportation were very helpful to the court.

The testimony of Dr. Charles Wabeck, plaintiff's other expert witness, was also highly credible and instructive. His evaluation added to the United States prices of replacing plaintiff's flock the costs of transportation, which include both the reasonable costs necessary for Mr. Wright to ravel to and from particular

breeders to evaluate specific birds and the costs of transporting those suitable birds when found to plaintiff's place of business. Although on their face the disparity between the evaluation figures of Dr. Skinner ($45,676.50) and Dr. Wabeck ($110,130.00) appear irreconcilable, after studying the record as a whole, the court was convinced that the difference is wholly attributable to transportation costs. Dr. Wabeck's expert evaluation, which provided evidence of the substantiality of these transportation costs, confirmed this finding.

Although USDA had three expert evaluations, it never asked any of the experts retained for an evaluation of transportation costs. Even after this court remanded the evaluations back to USDA, directing it to re-evaluate the flock on the basis of all the expert testimony

produced during discovery and in which plaintiff's experts had discussed the necessary inclusion of transportation costs, and even after Dr. Skinner, the Secretary's own independent remand witness that this court found so credible, told USDA that transportation costs should be considered, the Department made no evaluation of transportation costs.

At trial, instead of refuting plaintiff's transportation cost claims, defendant's experts agreed with plaintiff's assertion that transportation costs must be included in a breeder bird evaluation. Therefore, this court accepted the testimony it had received on the subject from plaintiff's expert, Dr. Wabeck. His valuation of Mr. Wright's flock at $110,130.00 included transportation costs as well as the cost of replacing the birds themselves. Accordingly, the court

accepted the only credible testimony of both plaintiff's and defendant's experts in determining the reparation and transportation costs of plaintiff's flock: $45,676.50 as the naked value of plaintiff's birds, as concluded by defendant's expert Dr. Skinner, and $64,453.50 as the necessary transportation costs for plaintiff's particular flock, as determined by plaintiff's expert Dr. Wabeck. The total sum for these two elements of fair market value equals $110,130.00.

3. Progeny Value and Lost Profits.

[7] Plaintiff also claimed that progeny value and lost profits should have been included as elements of the fair market valuation of his flock. Plaintiff asserted that because the government quarantine disallowed any movement of poultry within the quarantined area,

plaintiff was denied profits for the period of time in which plaintiff was prevented from doing business because of the government quarantine. Plaintiff requested damages in lost profits from the sale of birds that would have been produced from November, 1983 through June, 1985. Plaintiff further asserted damages in lost progeny of those breeds destroyed by the government ordered depopulation from June, 1985 onward. In sum, plaintiff claimed damages in lost profits for one selling season for his entire flock and damages in lost progeny for the remainder of his working lifetime. Defendant responded by arguing that plaintiff was not entitled to any lost profits under the statute, that there were not established bloodlines of either plaintiff or Mr. Miller, and that progeny value was too speculative to merit award.

As to plaintiff's lost progeny claims, plaintiff failed to overcome the threshold inquiry: whether the birds destroyed were in fact irreplaceable. Plaintiff's expert witness, Dr. Wabeck, testified that he "cannot say for certain whether a bird is irreplaceable or not...." Tr. at 161. In contrast, all of defendant's experts not only provided replacement values for all the birds destroyed, they all testified without equivocation that, in the words of Dr. Skinner, all of plaintiff's birds "could have been replaced ... in August of 1984 assuming a quality level suitable for ... breeding...." See Letter to USDA from Dr. John L. Skinner (April 3, 1989); see also Testimony of Burnell Bortner, T. at 438-39. Therefore, plaintiff's extended claim for progeny value for twenty-seven years was inappropriate. Plaintiff also sought lost profits. He asserted that

because the Secretary had earlier included profits as part of the fair market value measurement in Egg City II, it would be unreasonable for the Secretary to deny plaintiff profits in these similar circumstances. We are persuaded that plaintiff was entitled to some inclusion of a measure of profits in the fair market valuation of his flock because expert testimony at trial established lost profits as one of the elements necessary to a fair market valuation. This testimony was consistent with our findings that the unique nature of plaintiff's business as a poultry breeder was recognized in the regulation and that such compensation would be necessary to further the already identified congressional intent of encouraging all poultry farmers to cooperate with statutorily authorized government action. This finding is further

consistent with the Secretary's own previous actions under these same statutes in the similar Egg City case where the Secretary not only included a measure of lost profits in his determination of fair market value but increased that measure when he determined such action necessary "in order to pay full compensation for the destroyed chickens." Egg City II, F.2d at 1056.

Expert testimony at trial supported including lost profit compensation in the he determination of fair market value for breeders of poultry. Fro example, Mr. Bortner, defendant's primary expert, in response to a hypothetical based on the facts of this case said, "I feel I should be reimbursed [for lost profits]." Tr. at 403. Even defense expert Schallenberg agreed. Tr. at 479-80.

Testimony presented to the court also conclusively showed that plaintiff's lost profits as a breeder were different than the lost profits experienced by meat or egg producing poultry farmers. For example, egg producing poultry farmers can readily enjoy profits soon after the replacement of their flocks, while a poultry breeder cannot. A poultry breeder derives profits not from the sale of the replaced bird for meat or from its quickly produced eggs, but instead from the sale of new breeder birds produced from existing mature breeder birds. Therefore, a breeder's operation is not replaced by merely paying for the replacement of the breeders alone as the USDA attempted in this case. Testimony established that the period of time necessary for a poultry breeder to be in a position to make profits from his breeding operation is the well-known and well-

defined breeding season. Expert testimony further showed the breeding season to be from law winter through mid-summer,[7] depending on the breed, and that plaintiff's main selling season was from late spring to the end of summer. Plaintiff was under USDA quarantine from its inception in November of 1983 through the destruction of plaintiff's flock in July of 1984 until the quarantine was finally lifted in June of 1985.

For the Secretary to refuse to include some compensation for lost post-depopulation profits is contrary to congressional intent because that would not encourage poultry breeders to cooperate

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[7]When the court refers to "breeding season," it means the entire period of time per year during which eggs are hatched. A hatching period is a subset of the larger breeding season in which a bird produces eggs that hatch. Therefore, as the court has defined it, many breeds could have more than one hatching period within a breeding season.

with necessary government disease eradication actions. Including lost profits as an element of fair market value is consistent with the finding of the Court of Appeals for the Federal Circuit under similar circumstances in the already mentioned Egg City II which involved the same statutes at issue as in the present action. In Egg City II, the Court of Appeals upheld the Secretary's discretion to include a measure of lost profits under these same statutes. Egg City II, 697 F.2d at 1055-56. This court finds that had the Secretary properly evaluated plaintiff's flock for its fair market value as breeders, the Secretary would have included a measure of lost profits in its determination; the Secretary's denial of lost profits in the present circumstance was therefore at least arbitrary.

At trial, defendant did not present evidence as to what would be a proper amount of lost profits should the court award them. Instead, defendant merely reiterated that plaintiff was not entitled to progeny value or lost profits under section 134a. The only testimony provided this court in terms of determining the proper amount of lost profits came from plaintiff's expert witness, Dr. Wabeck, and from plaintiff himself. Plaintiff's formula took a three-year average of chicks produced per bird from plaintiff's hatchery and rounded that number to the nearest whole number to represent the number of chicks expected per bird per hatching period for the breed in question. Plaintiff's formula then multiplied that average by plaintiff's stated 1984 catalogue price for a chick of that breed an age. This figure represented the total

amount of money plaintiff could expect to receive for those chicks produced by that bird of that particular breed. Plaintiff then determined from an examination of his business profit and loss statements that approximately one-half of that amount represented the cost of production and, therefore, one-half of the total value was subtracted to off-set production costs. The resulting figure represented the amount of profit plaintiff expected per bird per breed per hatching period. Extending these figures to represent the entire breeding season showed plaintiff's lost profits to be $204,828.41.

In addition, plaintiff had added to his figure the "raw value" of each bird. Because those breeder birds are replaced, it would represent a double recovery to include the "raw value" figures here.[8] To

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[8]The court notes that even if these breeder birds producing the chicks were sold at the

arrive at the proper lost profits compensation figure, therefore, the court subtracted plaintiff's raw value totals from plaintiff's lost profit totals, consistent with plaintiff's formula, and arrived at the figure of $204,828.41. Therefore, $204,828.41 represents the statutorily recoverable profits plaintiff lost for one year.

As the evidence showed, however, plaintiff was out of business for two post-depopulation selling seasons. Following the flock's destruction in July of 1984, the USDA's quarantine on plaintiff's farms prevented plaintiff from returning to business until it was lifted in June of 1985. This USDA quarantine, therefore, caused plaintiff to effectively

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end of the breeding season for profit, that profit would still not be recoverable as plaintiff will now have the opportunity to do with the replaced breeder what he would have done with the destroyed breeder.

lose two breeding seasons, all of one selling season and much of a second selling season.[9] This is true because even if plaintiff had begun breeding poultry immediately after the quarantine was lifted, the 120-day maturation period would still have exceeded the 1985 selling seasons In the earlier Egg City case, the Secretary based his lost profit indemnity on the amount of time following flock depopulation that it would take a breeder "to raise a chicken to profitable ... age." Egg City II, 697 F.2d at 1055. Accordingly, the court finds that plaintiff

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[9]It is true that some of this damage was caused by the PDA quarantine from April, 1983 to November, 1983 but, plaintiff is not claiming damages arising during that time period in this action. Moreover, testimony at trial indicated that part of the delay in getting plaintiff back into business could be attributed to plaintiff a he was unable to clean his premises as required by statute. Regardless, defendant did not argue this point and the court can find no reason to take exception because of this delay.

was entitled to the profits he would have enjoyed in the second selling season lost as a result of the USDA's not lifting the quarantine until the middle of the breeding season as well as the profits lost during the first season while under actual quarantine. The total post depopulation lost profit recovery due plaintiff is therefore $409,656.82.

II. Damages to Property

[8] Plaintiff's second claim is for $38,071.77 in property damages done by the USDA in cleaning plaintiff's premises. The parties expressly agreed that USDA would clean plaintiff's premises at the government's expense because plaintiff was financially unable to perform the clean-up himself and the delay in accomplishing this clean-up required the avian influenza emergency quarantine to continue long after the disease had been eradicated in all

areas but plaintiff's two farms. The agreement between plaintiff and defendant governing the transaction gave defendant the right to dispose of those articles which in defendant's estimate could not be reasonably cleaned. Paragraph three of the parties' agreement provided:

> [The USDA's Animal and Plant Health Inspection Service (APHIS)] will attempt to clean and disinfect all nest boxes, partitions, drop boards, and other items. However, it is mutually understood and agreed that nest boxes, partitions, drop boards, and other items with rusted wire or metal or [rotted] wood [may] be disposed of if they cannot be readily cleaned and disinfected, as determined by APHIS.

Tr. at 499. At trial, the APHIS official in charge of the clean-up at both farms, Mr. Gene Longwith, testified that he did not believe that the government was liable to plaintiff for the property destroyed during the clean-up. Tr. at 521-30. However, this case is governed by specific regulations. See 9 C.F.R. Sections 53.5, 53.8, 81.12, 81.15 (1984). Both the implementing regulations of 21 U.S.C. Section 114a and 21 U.S.C. Section 134a provide for compensation for the value of material destroyed during a government ordered clean-up. 9 C.F.R. Sections 53.8, 81.15 (1984). Therefore, from the plain meaning of the statute, defendant is obligated to pay plaintiff the value of those materials destroyed regardless of who actually performed the clean-up.[10]

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[10]Furthermore, Mr. Longwith,a party to the formation of the agreement, admitted at trial that there was no language in the agreement between the parties which

Accordingly, plaintiff is entitled to receive the value of the materials destroyed during the clean-up. Factual questions remain, however, of what property was actually destroyed by the government pursuant tot he agreement and the value to be placed on that destroyed property.

Defendant argued that the property destroyed was minimal, offering supporting testimony of witnesses who were on the scene during the clean-up. They did not, however, convincingly contradict plaintiff's submission of photographic evidence and notes taken at the time of the destruction of plaintiff's property. This very convincing and largely undisputed evidence strongly supported plaintiff's assertion that the project was not closely managed by the government. The pictures

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specifically stated that defendant would not compensate plaintiff for items destroyed pursuant to the agreement. Tr. at 527.

showed tire tracks over knocked down fences, various piles of materials outside buildings, and workers throwing material out of second-story windows onto the ground below. None of defendant's witnesses could positively assure this court that the damages plaintiff showed by photographic evidence and notes taken at the time of the clean-up did not occur at the hands of defendant. On the contrary, testimony presented by defendant showed otherwise. Miss Joyce I. Witt, the government Animal Health Technician working during the clean-up, testified that she did not destroy anything but that things might have been destroyed by other government agents during the clean-up. Tr. at 543-45. The testimony of Mr. Longwith, whose attention could not have been focused on two farms at all times, was not persuasive. When asked upon examination "how many people worked on

the cleaning and disinfecting" she replied "[i]t was never the same number. The first day we had in the neighborhood of 18 people. We had 6 or 7 permanent federal employees and 10, 11, or 12 temporaries.... We never had the same number at any time." Tr. at 530. In addition, Mr. Longwith's testimony showed that many of these workers did not speak English and there were great difficulties in getting them to understand exactly what their jobs were. Tr. at 531.[11] The laxity of the operation as factually presented at tiral, was not consistent with sufficient management supervision. The evidence presented was consistent, however, with plaintiff's assertions of damage.

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[11] Defendant also offered the testimony of Dr. Gerald Fichtner, director of the Avian Influenza task force. He described the condition of plaintiff's premises at the time of depopulation. These conditions were irrelevant, however, as the damages claimed by plaintiff arose out of the later government clean-up. Tr. at 483-87.

One particularly large item of contention between the parties, representing $35,000.00 of plaintiff's total $38,071.77 claim, involved the replacement of two 32h Robbins incubators. The court, as finding of fact, was not persuaded by plaintiff's testimony that these incubators were rendered unusable Plaintiff offered evidence that before the clean-up there were five boxes of necessary replacement parts, including back-up thermostats and operating manuals, for the incubators in plaintiff's hatchery. During the clean-up, the boxes, containing these necessary materials, were apparently destroyed. Plaintiff argued that the lack of thermostats rendered the incubators unusable. Neither party presented expert testimony as to the value of the thermostats. Defendant offered testimony from Mr. Longwith that reed mercury

replacement thermostats are readily available, along with operating manuals, at a cost of $562.50. Plaintiff replied that wafer-type thermostats were necessary for his machine and that neither his machine nor the necessary replacement parts for the incubators were made by anyone in this country anymore because the original manufacturer had been out of business for a long time and, therefore, no replacement parts were readily available This, plaintiff explained, necessitated the $35,000 expenditure to replace the incubators.[12] Plaintiff, however, did not provide convincing testimony that he had made a thorough search for replacement thermostats and that none could be found at any location at any price.

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[12]Two functioning incubators are required, with one serving a back-up to the other, to insure consistent incubation during the hatching process.

The remainder of the items destroyed consisted of either normal items expected to be found on a poultry farm, from paper egg trays to wooden skids and metal waterers, or property destroyed by the clean-up, such as the driven-down fence. Plaintiff's witnesses more than convincingly established these damages at trial. The testimonies, photographic evidence, and general circumstances of chaos surrounding the clean-up operation, lead the court to find that plaintiff met its burden of persuasion on this portion of its property damages claim and is entitled to recover $3,071.77 claimed in property damages.

CONCLUSION

The fair market value of plaintiff's flock should have been determined based on their value as breeder birds, as described and mandated by statute. Had the Secretary

properly evaluated plaintiff's flock as breeder birds, he would have included repopulation costs including the purchase price of the birds, transportation costs, and post depopulation lost profits as necessary elements of his reasonable evaluation of "fair market value." By not so evaluating plaintiff's flock, the Secretary acted unreasonably and contrary to law. 21 U.S.C. Sections 114a, 134a (1982); 9 C.F.R. Sections 53.3, 81.14 (1984). Plaintiff is entitled to $45,676.50 compensation for a base replacement cost of its flock, $64,453.50 compensation for transportation costs, and a lost profit compensation of $409,656.82 for two selling seasons, resulting in a total fair market value compensation of $519,786.82. Plaintiff has also prevailed on his statutorily prescribed property damages claim for $3,071.77 as a result of

the clean-up of plaintiff's farms. Therefore, the total amount due plaintiff is $522,858.59. The Clerk of the Court is directed to enter judgment accordingly.

IT IS SO ORDERED.

Frederick L. WRIGHT, III, et al., Plaintiffs

v.

The UNITED STATES, Defendant.

No. 520-87C.

United States Claims Court.

May 31, 1988.

Operators of poultry business whose entire chicken flock was destroyed by government agents after it was determined to have avian influenza brought two suits seeking compensation for destruction of the flock and for damage caused by efforts to clean and disinfect the property. The United States District Court for the

Eastern District of Pennsylvania dismissed both suits for lack of jurisdiction and transferred them to the Claims Court. On defendant's motion to partially dismiss the complaint for failure to state claims, the Claims Court, Moody R. Tidwell, III, J., held that (1) plaintiffs stated a claim by alleging that fair market value determination pursuant solely to particular statute and regulation was arbitrary, capricious, or an abuse of discretion, and (2) plaintiffs also stated claim with regard to damage to property caused by cleaning and disinfecting; and (3) Fifth Amendment taking claim did not lie.

Motion granted in part and denied in part.

1. Animals - 37

Operators of poultry business whose entire chicken flock was determined to have avian influenza and which was destroyed by

federal agents stated a claim against the government by alleging that fair market value determination pursuant solely to particular state and regulation was arbitrary, capricious or an abuse of discretion. 21 U.S.C.A. Section 134a.

2. Animals - 37

Operators of poultry business whose entire chicken flock was determined to have avian influenza and which was destroyed by government agents stated a claim against the government pursuant to statutes and under a contractual theory arising out of agreement, where operators alleged damage due to cleaning and disinfecting of their property by agents after flock was destroyed. 21 U.S.C.A. Sections 114a, 134a.

3. Federal Courts - 1073

Claims Court lacked jurisdiction over claims that the government violated Fifth and Fourteenth Amendment rights of due process and equal protection where claims could not be fairly interpreted to mandate money damages U.S.C.A. Const. Amends. 5, 14.

4. Eminent Domain - 2(2)

Operators of poultry business whose entire chicken flock was destroyed by federal agents because it had avian influenza could not assert a Fifth Amendment taking claim against the government; when acting under the police power the destruction of diseased animals requires no compensation. U.S.C.A. Const.Amend. 5.

Kenneth C. Sandoe, Myerstown, Pa., for plaintiffs.

Paul J. Ehlenbach, Washington, D.C., with whom was Asst. Atty. Gen. John R. Bolton, for defendant.

ORDER

MOODY R. TIDWELL, III, Judge:

This action came before the court on defendant's motion to partially dismiss plaintiffs' complaint for failure to state valid claims within the jurisdiction of the court. In its motion defendant contended that plaintiffs' claims are governed exclusively by 21 U.S.C. Section 134a and 9 C.F.R. Sectin 81 and that all other causes of action are without this court's jurisdiction. Plaintiff responded that both 21 U.S.C. Sections 114a and 134a and their accompanying regulations are applicable. In addition, plaintiffs asserted claims under due process, equal protection and fifth amendment taking.

FACTS

Plaintiffs, Frederick L. Wright, III, Marjorie Wright, Fred L. Wright, Inc., T/A Willow Hill Hatchery, Willow Hill Poultry Farms and Willow Hill Poultry, operated a poultry business located in Berks County, Pennsylvania. The operation included hatching and breeding operations and custom poultry processing. Distribution was national and international. The suit arises from the disposal of 4,500 of plaintiffs' chickens by the Animal & Plant Health Inspection Service of the United States Department of Agriculture.

In April 1983, there was an outbreak of highly pathogenic avian influenza[1] among

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[1] Highly pathogenic avian influenza is:
(a) disease of poultry caused by any influenza virus Type A that results in not less than 75 percent mortality within 8 days in at least 8 healthy susceptible chickens, 4-8 weeks old, inoculated by the intramuscular, intravenous, or caudal airsac route with bacteria-free infectious allantoic or cell culture fluids and using standard laboratory operating procedures to assure specificity. 9 C.F.R. Section 81.1.

poultry in Pennsylvania. In November of that year defendant quarantined the geographic area in which plaintiffs operated their business. On or about December 23, 1983, defendant implemented various other prohibitions and restrictions regulating the transportation of poultry and related articles out of and into the quarantine area. part of plaintiffs' operation was at that time inside the zone and part was outside the zone. In February 1984, the quarantine zone was expanded to include plaintiffs' entire operation. On April 20, 1984, plaintiffs' poultry flock was tested and no presence of the avian influenza virus was found. A second examination of the flock indicated that plaintiffs' poultry eggs tested positive for the virus. On July 23, 1984, defendant informed plaintiffs that the destruction of plaintiffs' flock was necessary in an

effort to eradicate the disease. Plaintiffs asserted that defendant, on July 31, 1984, averred that it was willing to discuss allowing plaintiffs to save a certain number of healthy birds of a rare blood line from destruction. However, on August 1, 1984, two federal marshalls, four state police officers and seventy five other federal employees entered plaintiffs' properties and slaughtered the entire flock.

Some weeks later, defendant, pursuant to 9 C.F.R. Section 81.14 offered plaintiffs $33,025.44 as fair market value of the flock based upon defendant's appraisals which defendant had conducted on July 7, 1984 and August 1, 1984. A similar appraisal provision appears in 9 C.F.R. Section 53.3. Plaintiffs rejected the offer of compensation as inadequate.

In April 1985, pursuant to an agreement of the parties, defendant cleaned and disinfected plaintiffs' property. The quarantine on plaintiffs' premises was lifted on May 20, 1985. Thereafter, plaintiffs filed two suits against the United States in the U.S.C. District Court for the Eastern District of Pennsylvania, pursuant to 21 U.S.C. Sections 114a and 134a, and 9 C.F.R. Sections 50, 51, 53, 54, 56 and 81, seeking compensation for destruction of its flock and damage to its property caused by defendant's efforts to clean and disinfect the property. The district court dismissed both suits for lack of jurisdiction and transferred them to this court. Wright v. United States Dep't of Agric., No. 86-3171 (E.D. Pa. July 14, 1987) [available on WESTLAW, 1987 WL 13756].

DISCUSSION

Statutory Claim

[1] Plaintiffs' complaint asserted that the Secretary of Agriculture's determination of the fair market value of plaintiff's flock pursuant solely to 21 U.S.C. Section 134a and 9 C.F.R. Section 81 was arbitrary, capricious or an abuse of discretion. Plaintiffs cannot prevail on the merits unless this is proven. Julius Goldman's Egg City v. United States, 214 Ct.Cl. 345, 351, 556 F.2d 1096, 1099 (1977) (Egg City I). The motion currently before the court does not go to the merits but seeks to dismiss certain of plaintiffs' claims asserting that the court lacks jurisdiction. Plaintiffs contended that the Secretary's computation of compensation should be governed by 21 U.S.C. Section 114a as well as section 134a, and their implementing regulations, 9 C.F.R. Sections 53 an d81. Defendant contended that review

of the Secretary's computation of plaintiffs' claim should be limited to application of 21 U.S.C. Section 114a and 9 C.F.R. Section 53 should be considered together with 21 U.S.C. Section 134a and 9 C.F.R. Section 81 in reviewing the determination by the Secretary of fair market value of the destroyed poultry and the value of property damaged.

The parties' contentions arose because 21 U.S.C. Section 114a an 9 C.F.R. Section 53 address "the control and eradication of any communicable diseases of livestock or poultry" without expressly including avian influenza, while 21 U.S.C. Sectin 134a and 9 C.F.R. Section 81 expressly address avian influenza.

The starting point for the interpretation of a statute is in the statutory language itself. American Tobacco Co. v. Patterson, 456 U.S.C. 63,

68, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748 (1982). The avian influenza at issue is clearly within the language of both provisions, but the court is asked to decide whether one provision should be applied exclusive of the other contrary to the general rule that statutory provisions are to be construed not in isolation but together so as to produce a harmonious whole. Philbrook v. Glodgett, 421 U.S.C. 707, 713, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525 (1975) (citing United States v. Heirs of Boisdore, 49 U.S.C. (8 How.) 113, 122, 12 L.Ed. 1009 (1849); Kokoszka v. Belford, 417 U.S.C. 642, 650, 94 S.Ct. 2431, 2436, 41 L.Ed.2d 374 (1974) (citing Brown v. Duchesne, 60 U.S.C. (19 How.) 183, 194, 15 L.Ed. 595 (1856)); United Mine Workers v. Andrus, 581 F.2d 888, 892 (D.C.Cir.1978), cert. denied sub nom, Carbon Fuel Co. v.

Andrus, 439 U.S.C. 928, 99 S.Ct. 313, 58 L.d.2d 321 (1978); Candelaria v. United States, 5 Cl.Ct. 266, 272 (1984).

Plaintiffs asserted that 21 U.S.C. Sections 114a and 134a should be read in conjunction with one another. Section 114a of Title 21 of the United States Coe authorizes the Secretary to "control and eradicate any communicable diseases of livestock or poultry ... including the payment of claims growing out of destruction of animals (including poultry), and of materials, affected by or exposed to any such disease." 21 U.S.C. Section 114a (parenthetical in original). Similarly, 21 U.S.C. Section 134a provides that the Secretary, "in order to guard against the introduction or dissemination of a communicable disease of livestock or poultry, may seize, quarantine, and dispose of, in any reasonable manner" diseased

poultry. Furthermore, the Secretary is directed to "compensate the owner of any animal, carcass, product, or article destroyed pursuant to the provisions of this section." 21 U.S.C. Section 134a(d).

The United States Court of Claims offered some guidance as to the interrelationship of 21 U.S.C. Sections 114a and 134a. In Julius Goldman's Egg City v. United States, 214 Ct.Cl. 345, 556 F.2d 1096 (1977) (Egg City I), the court's analysis combined the application of sections 114a and 134a. That court held:

> The case concerns a lesser-known but far-reaching federal authority. Congress has given the Secretary of Agriculture power to "control and eradicate any communicable diseases of livestock or poultry ... which in the opinion of the Secretary

constitute an emergency and threaten the livestock industry of the country," and has also authorized "the payment [by the Secretary] of claims growing out of the destruction of animals (including poultry), and of materials, affected by or exposed to any such diseases, in accordance with such regulations as the Secretary may prescribe." 21 U.S.C. Section 114a. This power is spelled out in more detail in 21 U.S.C. Sectin 134a(a) and (b), including the right to seize, quarantine, and dispose of animals which are found to have been affected with or exposed to any such dangerous or communicable disease.

Egg City I, at 348, 556 F.2d at 1097.

Plaintiffs have asserted that the Egg City I rationale should apply in this case and that 9 C.F.R. Section 53 still further elaborates factors of the Secretary to consider in the computation of fair market value pursuant to 21 U.S.C. Sections 114a and 134a and 9 C.F.R. Section 81. The court notes that 9 C.F.R. Section 53 was promulgated before 21 U.S.C. Section 134a and 9 C.F.R. Section 81. The court believes that the statutory authority under which section 81 was later promulgated included both 21 U.S.C. Sections 114a and 134a and that 9 C.F.R. Section 53 sheds helpful light on the provisions considered as a whole. Section 53 appears to serve as a basis for the later section 81. Regulation 9 C.F.R. Section 81.14 states that "[p]oultry, carcasses or parts thereof, egg,s products, or articles required to be destroyed ... shall be

appraised.... The appraisal shall be the fair market value at the time of destruction...." It appears that under 9 C.F.R. Section 53.3b the Secretary may have less discretion in determining the fair market value because it mandates consideration of more factors. It states that "[t]he appraisal of animals shall be based on the fair market value and shall be determined by the meat, egg production, dairy or breeding value of such animals. Animals may be appraised in groups providing they are the same species and type." Therefore, when the regulations are construed together, the Secretary is aided by additional factors when establishing fair market value of destroyed animals. Plaintiffs asserted that specialty birds involving rare and irreplaceable blood lines were slaughtered and that fair market compensation should include breeder and

progeny value. The court believes that it is not necessarily precluded from considering the whole statute for a proper fair market value determination because the quality and value of plaintiffs' rare birds may fall under the factors to be considered in 9 C.F.R. Sectin 53. Therefore, there is a possibility that the Secretary's computation for fair market value was arbitrary, capricious or an abuse of discretion.

This construction is supported by Julius Goldman's Egg City v. United States, 697 F.2d 1051 (Fed.Cir.), cert. denied, 464 U.S.C. 814, 104 S.Ct. 68, 78 L.Ed.2d. 83 (1983) (Egg City II). That court held:

> The appellant also contends that the sum of the two indemnities did not adequately compensate it for the fair market value of its destroyed flock. The statute

> provides that the Secretary "shall" compensate the owners of diseased animals, destroyed under the section; and that "[s]uch compensation shall be based upon the fair market value as determined by the Secretary, of any such animal ... at the time of the destruction thereof." 21 U.S.C. Section 134a(d)(1970). The fair market value of chickens therefore "shall be determined by the ... egg production ... value of such animals." 9 C.F.R. Section 53.3(b) (1975).

Id. at 1054.

Egg City II is cited for the proposition that 9 C.F.R. Section 53 may properly be considered with the later enacted 21 U.S.C. Section 134a, as plaintiffs here urge. Defendant's assertion is that the statutes

and regulations are mutually exclusive because the language of section 134a confers the Secretary broad power to "seize, quarantine, and dispose" not conferred by section 114a's power to "control and eradicate." Egg City II does not support that assertion. The court agrees with defendant's statement in its reply brief that "whenever the Secretary acts pursuant to section 134a, he also acts pursuant to section 114a." The court notes that defendant also stated in a footnote that the converse would not be true.

Defendant also cited Yancy v. United States, 10 Cl.Ct. 311 (1986), to support its contention that sections 114a and 134a are incompatible. In Yancey, defendant quarantined plaintiffs' poultry business and did not permit plaintiff to ship turkeys or hatch eggs interstate despite test results indicating plaintiff's turkeys

to be both healthy and unexposed to the avian virus. Plaintiff sold the flock for meat after deciding that keeping the flock alive was uneconomic. Plaintiff later sued for compensation. The court held that 21 U.S.C. Section 134a was inapplicable for a claim of compensation because defendant failed to satisfy the requirements of either sections 134a(a) or 134a(b). The court held that 21 U.S.C. Section 134a(a) did not apply because plaintiff's flock were not yet moving or moved in interstate commerce and had not been affected or exposed to the disease. The court also held 21 U.S.C. Sectin 134a(b) not to apply because the Secretary ha not declared an emergency, plaintiffs' stock was not affected or exposed, the stock was not ordered destroyed, and stock sold as meat is not a compensable disposal under the statutes. The court also found plaintiffs'

claim not compensable under section 114a and section 53 based on nearly the same criteria; the stock was not contaminated by or exposed to the disease, the Secretary had not required the flock destroyed, and the flock was not destroyed for purposes of the regulatory payment program. Yancey, at 316.

There is no evidence in Yancey suggesting that the court believed 21 U.S.C. Sections 114a and 134a to be mutually exclusive as defendant here contended. To the contrary, Yancey considered both section 114a and 134a as possibly applicable in holding plaintiff's claim not compensable. In any event Yancey is distinguishable on its facts. In the present case a state of emergency was declared in November of 1983 due to the outbreak of avian influenza. There was no emergency in Yancey. In this case,

plaintiff's flock was determined by defendant to be infected with the avian virus and was ordered destroyed. Destruction was executed by defendant. In Yancey, plaintiff's flock was healthy and not required by defendant to be destroyed. Also, in Yancey the sale of the flock as meat was not cognizable under section 114a or section 134a. Furthermore, there is no indication by the Yancey court that had plaintiff's flock been destroyed pursuant to an order by the Secretary that fair market value would not have included the considerations in section 53.3.

Defendant's partial motion to dismiss with respect to the applicability of both 21 U.S.C. Section 114a and 9 C.F.R. Section 53 is, therefore, denied.

[2] Additionally, although this court's discussion addressed the compensation of plaintiffs destroyed flock,

the court is of the opinion that it is possible that plaintiffs may also recover property damages pursuant to 21 U.S.C. Sections 114a and 134a and under a contractual theory arising out of the "Agreement" of March 28, 1985 due to defendants cleaning and disinfecting of plaintiffs property. Therefore, the motion to dismiss a claim for property damage is denied.

Due Process and Equal Protection Claim

[3] Plaintiffs asserted that defendant violated their fifth and fourteenth amendment rights of due process and equal protection. These contentions are rejected because this court lacks jurisdiction over claims because they cannot be fairly interpreted to mandate money damages against the United States when violated. Carruth v. United States, 224 Ct.Cl. 422, 445, 627 F.2d 1068, 1081

(1980); Muehlen v. United States, 209 Ct. Cl. 690, 690, 529 F.2d 533 (1976); Morgan v. United States, 12 Cl.Ct. 247, 253 (1987); Bounds v. United States, 1 Cl.Ct. 251, 216 (1982), aff'd, 723 F.2d 68 (Fed.Cir.1983). Since neither the due process clause nor the equal protection clause provide monetary relief, the court lacks jurisdiction over such claim.[2] United States v. Testan, 424 U.S.C. 392, 400, 96 S.Ct. 948, 954, 47 L.Ed.2d 114 (1975); Eastport Steamship v. United States, 178 Ct.Cl. 599, 605-09, 372 F.2d 1002, 1007-10 (1967).

Taking Claim

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[2]This court has been characterized in the parties briefs as a court of "limited" jurisdiction. This is the "shorthand" method of describing the court's jurisdiction. Rather, the court is one of "specific" jurisdiction. While its jurisdiction is limited to money mandating provisions of law, regulations, contracts, etc., that jurisdiction is specified, with few exceptions, to lie solely within this court. It is more than a matter of semantics.

[4] Plaintiffs also asserted an unlawful fifth amendment taking for which just compensation is required. However, when acting under the state police power the destruction of diseased animals requires no compensation. Cf. Miller v. Schoene, 276 U.S.C. 272, 279-80, 48 S.Ct. 246, 247-48, 72 L.Ed. 568 (1928); Loftin v. United States, 6 Cl.Ct. 596, 612 (1984), aff'd, 765 F.2d 1117 (Fed.Cir.1985). the basic reasoning used by the courts in support of this exercise of police power without compensation is that such diseased animals are obnoxious to the public health. Where public interest is involved, preferment of that interest over the property interest of the individual, even to the extent of its destruction, is not unconstitutional. Miller, 276 U.S.C. at 279-80. 48 S.Ct. at 247-58; Loftin, at 611-12. This court agrees with the

rationale in Loftin that "[t]he diseased animals in this case can reasonably be considered a public nuisance. It follows then that no compensation for the destruction of these animals was required. However, Congress acting under the commerce clause in passing essentially a police regulation saw fit to compensate owners...." Loftin, 6 Cl.Ct. at 612. Therefore, under the authority of Miller and Loftin and on the facts of this case, a fifth amendment taking claim does not lie.

CONCLUSION

Defendant's motion to dismiss is granted in part and denied in part. Plaintiffs' claims based upon lack of due process, equal protection and fifth amendment taking are dismissed as being outside of the jurisdiction of this court.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

90-5089, -5096

FREDERICK L. WRIGHT, III and MARJORIE WRIGHT, his wife, and FRED L. WRIGHT, INC., t/a WILLOW HILL HATCHERY, WILLOW HILL POULTRY FARMS and WILLOW HILL POULTRY,

Plaintiff/Cross-Appellant,

v.

THE UNITED STATES,

Defendant, Appellant.

DECIDED: February 12, 1991

Before MARKEY, MAYER and MICHEL, Circuit Judges.

PER CURIAM.

DECISION

The judgment of the United States Claims Court awarding Wright $522,858.59 for the destruction of his flock and property pursuant to the United States Department of Agriculture's (USDA's) lethal avian influenza eradication program in Pennsylvania is affirmed in part and reversed in part. See 19 Cl. Ct. 590 (1990). No costs.

OPINION

No. 90-5089: Both the regulations implementing section 114a and section 134a itself specify that Wright is entitled to the "fair market value" of his flock at the

time of its destruction. 21 U.S.C. Sections 114a, 134(d) (1988); 9 C.F.R. Section 53.3(b) (1990). "Fair market value" is a "general concept long known to the law, with ascertainable out boundaries and not unlimited in its scope." Julius Goldman's Egg City v. United States, 556 F.2d 1096, 1100 (Ct. Cl. 1977) (Egg City I). It "is generally defined as 'the price at which property would change hands in a transaction between a willing buyer and a willing seller, neither being under compulsion to buy or sell, and both being reasonably informed as to all relevant facts.'" Julius Goldman's Egg City v. United States, 697 F.2d 1051, 1054 n.3 (Fed. Cir. 1983) (Egg City II) (quoting Miller v. United States, 620 F.2d 812, 825 (Ct. Cl. 1980)). How fair market value is

defined is a legal question; what constitutes fair market value in a particular case is a factual matter.

The Claims Court appears to have confused the two. It expanded the definition of fair market value to include "transportation costs incidental to a breeder's repopulation of his flock" because "the majority of expert witnesses at trial ... agreed that they expected transportation costs to be paid in these circumstances." 19 Cl. Ct. at 600. Similary, it awarded over $400,000 in post-destruction lost profits "because expert testimony at trial established lost profits as one of the elements necessary to a fair market valuation." Id. at 603. That experts in the art of valuing poultry so define "fair market value" does not make that definition legally correct. Notwithstanding the opinions credited by

the court, "fair market value" at the time of destruction is equivalent neither to "replacement cost" nor to "value expected if no disease exposure had occurred"--non-statutory measures that might include the transportation costs and lost profits erroneously awarded here.

Egg City II is not to the contrary. We repeatedly stressed that the initial and supplemental indemnities paid their together represented the fair market value of the flock destroyed; the supplemental indemnity was not a separate payment to compensate for lost profits until the flock could be replaced. 697 F.2d at 1055. USDA was forced to use a complicated and somewhat confusing measure of fair market value because, unlike the situation here, it "found that there was no actual market for chickens of various ages in an egg rancher's flock." Id. (emphasis added).

We concluded by noting that "the statute required only payment of fair market value of the chickens at the time of destruction, not payment of profits after destruction." Id. at 1057.

In this case, the experts' valuation of Wright's flock as breeders ranged from $34,365.44 to $45,329.50, exclusive of transportation costs and lost profits. USDA's original appraiser, Bortner, settled on the lower figure after the court remanded the case to USDA for a re-evaluation of Wright's flock as breeders rather than exhibition birds. Two other experts agreed with him: Wunderlich, retained by USDA after the remand, and Schallenberg, who served as one of plaintiff's experts and who accompanied Bortner at the original evaluation and testified at trial that "at the time of evaluation he could see no greater value in

the flock as breeders than as exhibition birds." 19 Cl. Ct. at 599. USDA relied on the Bortner/Schallenberg appraisal largely because, of all the experts valuing the flock, only they had seen is shortly before its destruction.* Id. at 598.

Nevertheless, the court substituted its judgment for that of USDA. It preferred the deposition testimony of Skinner because he "displayed independent

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*Though urged to do so, we need not decide whether USDA acted pursuant to section 114a, section 134a, or both. Even if the assertedly "narrower" valuation regulation under section 114a applies -- "The appraisal of animals shall be based on the fair market value and shall be determined by the meat, egg production, dairy or breeding value of the animals," 9 C.F.R. Sectin 53.3(b) (1990) (emphasis added) -- rather than that under section 134a -- "The appraisal shall be the fair market value at the time of destruction ...," 9 C.F.R. Section 81.14 (1990) -- USDA complied. The record shows that USDA did value the flock specifically as breeders and did adjust its original appraisal, based on the value as exhibition birds, accordingly. That the adjustment was minor is no reason to question the truth of USDA's stated basis for its final appraisal, especially in light of Schallenberg's testimony.

understanding of the breeder industry and the condition of [Wright's] birds at the time of their destruction" -- despite never having seen the flock -- and because he testified clearly and unequivocally that he evaluated the flock based on the value of the birds as breeders. Id. at 599. But the court is not free to decide the issue of fair market value de novo. It can void determinations by USDA only if they are arbitrary, capricious, an abuse of discretion, or violative of the statutory standard. Egg City I, 556 F.2d at 1100. That is not the case here. On this record, the court should have affirmed USDA's valuation of $34,365.44.

No. 90-5096: The trial court found that Wright "failed to overcome the threshold inquiry: whether the birds destroyed were in fact irreplaceable." 19 Cl. Ct. at 602. Though the record does

contain some testimony to the contrary, we are not persuaded of clear error. Accordingly, Wright is not entitled to compensation for the "lost progeny value" of his flock.

Wright similarly failed to meet his burden of showing that replacement thermostats for the two incubators were unavailable. Longwith's testimony independently supports the government's claim that replacement thermostats existed. USDA therefore did not need, and in fact the court did not rely on, government exhibit No. 60, which Wright argues was inadmissible hearsay. See id. at 606. Given the conflicting testimony of Longwith and Wright on this point, we cannot say the court was wrong in concluding that the government did not render the two incubators permanently inoperable.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-5089, -5096

FREDERICK L. WRIGHT, III
and MARJORIE WRIGHT, his
wife, and FRED L. WRIGHT, INC.,
t/a WILLOW HILL HATCHERY, WILLOW
HILL POULTRY FARMS and WILLOW HILL
POULTRY,
Plaintiffs/Cross-Appellant,

v.

THE UNITED STATES,
Defendant-Appellant.

O R D E R

Before MARKEY, Circuit Judge, MAYER, Circuit Judge, MICHEL, Circuit Judge

A petition for rehearing having ben filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on March 22, 1991.

Dated: March 15, 1991